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# Racketeers, Congress, and the Courts: An Analysis of RICO

Craig M. Bradley\*

In enacting the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup>—which is title IX of the Organized Crime Control Act of 1970 (the Act)<sup>2</sup>—Congress was motivated by extensive evidence leading to the conclusion that organized crime was a “cancer in our cities,”<sup>3</sup> which would require strong measures to combat and eradicate. The hearings that preceded the Act, including Joseph Valachi’s startling disclosures of the organization and scope of the Mafia,<sup>4</sup> led to a nationwide fear that our society’s basic institutions were being eroded by this evil force. The popular reaction was not unlike the “red scares” that swept the nation in the 1920s and again in the 1950s.<sup>5</sup>

While the menace manifested by organized crime is certainly not a chimera, the exact threat that it poses to democratic institutions and the best way to deal with that threat are uncertain. What is certain is that, by enacting RICO in an atmosphere of fear, Congress overreacted to the problem with a statute that is overly broad. The courts, similarly moved by the public alarm over organized crime,<sup>6</sup> have not only wholeheartedly

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The author has served as an Assistant United States Attorney in Washington, D.C., and as a Senior Trial Attorney, Public Integrity Section, United States Department of Justice. The views expressed herein are those of the author and not of the Department of Justice.

1. 18 U.S.C. § 1961 (1976). For the text of RICO, see Appendix.

2. Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

3. 111 CONG. REC. 4277 (1965) (message from President).

4. *Hearings Before the Permanent Subcomm. on Investigations of the Sen. Comm. on Government Operations*, 88th Cong., 1st Sess. 80-83 (1963) (testimony of Joseph Valachi).

5. In a case involving a member of the left-wing section of the Socialist Party, the Supreme Court said that “his utterances were ‘endangering the foundations of organized government’ and imperiling New York’s ‘existence as a constitutional State.’” Chafee, *Thirty-Five Years with Freedom of Speech*, 1 U. KAN. L. REV. 1, 4-6 (1952) (quoting *Gitlow v. New York*, 268 U.S. 652, 667 (1925)). Chafee pointed out that in 1952 this “red scare” was considered to have been exaggerated and suggested that the then current red scare would be seen as similarly overblown in another thirty years. *Id.* at 6.

6. For example, in *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), the Court declared:

enforced this statute, but have in many cases expanded it far beyond the congressional language and intent.<sup>7</sup> The broad language of RICO and the judicial zeal in enforcing it have caused many individuals to be prosecuted whom Congress clearly had no intention of reaching.<sup>8</sup> Furthermore, the failure of the courts to interpret this powerful statute narrowly may ultimately defeat its purpose entirely by forcing the Supreme Court to strike it down.

It is the purpose of this Article to analyze RICO carefully, section by section, in an attempt to determine the congressional purpose, whether that purpose is constitutionally permissible, and whether the courts have accurately and constitutionally reflected that purpose in their interpretations. The conclusion will be that Congress enacted an unduly broad statute that could be largely cured by narrow judicial construction. Far from construing the statute narrowly, however, the courts, reflecting the national fear of racketeering, have extended RICO beyond the broadest boundaries permitted by the statutory language, thereby defeating the congressional intent and raising serious constitutional questions.

### I. HISTORY OF THE LEGISLATION

Beginning in the early 1950s, a national concern over the problem of organized crime began to emerge.<sup>9</sup> A series of conferences<sup>10</sup> led to federal legislation in 1961 prohibiting the promotion of gambling, nar-

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In this case we deal with the question of whether and, if so, how a free society can protect itself when groups of people, through division of labor, specialization, diversification, complexity of organization, and the accumulation of capital, turn crime into an ongoing business. Congress fired a telling shot at organized crime when it passed the Racketeer Influenced and Corrupt Organizations Act of 1970, popularly known as RICO. Since the enactment of RICO, the federal courts, guided by constitutional and legislative dictates, have been responsible for perfecting the weapons in society's arsenal against criminal confederacies.

*Id.* at 884 (citation omitted).

7. The court opinions reflect a patriotic zeal not to stop halfway when dealing with such a grave problem. Thus, in *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), the court, in adopting a very broad interpretation of RICO, made the following observations:

Congress had no reason to adopt a constricted approach to the . . . problem. Congress was concerned with the infiltration of organized crime into the American economy and to [*sic*] the devastating effects that racketeering activity had upon it. Yet, we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's economic life, Congress intended to ignore an important aspect of the economy . . . ? We think not.

*Id.* at 1090-91 (footnote omitted).

8. See notes 108, 110-11, 118-30 & 217-27 *infra* and accompanying text.

9. 115 CONG. REC. 5872-90 (1969) (remarks of Sen. McClellan).

10. At the United States Conference of Mayors in 1950, some of the mayors reported that organized crime had become so serious that individual localities were no longer able to suppress it. S. REP. NO. 307, 82d Cong., 1st Sess. 1-2 (1951). The Attorney General's Conference on Organized Crime was instrumental in the formation of the Special Com-

cotics, and other criminal enterprises through interstate travel or the use of interstate facilities.<sup>11</sup> Attorney General Robert Kennedy made the fight against organized crime a national priority and greatly expanded the Justice Department staff devoted to the cause.<sup>12</sup> Despite these efforts, organized crime continued to flourish.<sup>13</sup> The National Crime Commission reported that one reason for the growth of organized crime was the difficulty in proving cases against known organized crime figures because of "defects in the evidence gathering process."<sup>14</sup> This led to the introduction in the Senate of the Organized Crime Control Act of 1969.<sup>15</sup> The 1969 Act contained nine titles, providing, *inter alia*, for special grand juries to investigate organized crime (title I),<sup>16</sup> means to compel testimony from recalcitrant witnesses (titles II and III),<sup>17</sup> protection of witnesses (title VI),<sup>18</sup> and increased punishment for "organized crime offenders" (title VIII).<sup>19</sup> As originally proposed, the Organized Crime Control Act of 1969 did not contain a provision comparable to RICO.

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mittee to Investigate Organized Crime in Interstate Commerce. 115 CONG. REC. 5876 (1969) (remarks of Sen. McClellan). Other federal activity included the establishment of the Organized Crime and Racketeering Section by the Justice Department in 1954 and the formation of the Senate Select Committee on Improper Activities in the Labor and Management Field, chaired by Senator McClellan. The Senate Select Committee's investigations were continued by the Senate Permanent Subcommittee on Organized Crime. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, S. 30, 91st Cong., 1st Sess. 159-60 (1969); see THE PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 10-24 (1967).

11. See 18 U.S.C. § 1952 (1976). Other legislation passed at the same time as part of the Attorney General's program to combat organized crime includes 18 U.S.C. §§ 1073 (flight to avoid prosecution or giving testimony), 1084 (transmission of wagering information), 1953 (interstate transportation of wagering paraphernalia) (1976); and 15 U.S.C. § 901-909 (1976) (transportation of firearms), *repealed by* Act of June 19, 1968, Pub. L. 90-351, § 906, 82 Stat. 234.

12. See 116 CONG. REC. 844-45 (1970) (remarks of Sen. Kennedy).

13. Between 1960 and 1969, the federal government was able to obtain only 235 indictments (involving 328 defendants), against the 5000 known members of the syndicate. A study showed that members of the syndicate obtained dismissals or acquittals on the charges against them more than twice as often as other defendants. Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41, 44 (1970); see D. CRESSEY, *THEFT OF THE NATION* 99-108 (1969).

14. 115 CONG. REC. 5877 (1969) (remarks of Sen. McClellan). Specifically, the Commission found that under then present procedures too few witnesses were produced to prove the link between criminal group members and the illicit activities they sponsored. This situation was caused by the fear that organized crime induced in prospective witnesses, the reluctance of some citizens to be an "informer," and the unwillingness of some informants to testify publicly. *Id.*

15. *Id.* at 827. The bill was introduced by Senator McClellan, with Senators Hruska, Allen, and Ervin as cosponsors. *Id.* at 832, 5877.

16. S. 30, 91st Cong., 1st Sess. §§ 101-105 (1969) (current version at 18 U.S.C. §§ 3321-3330 (1976)).

17. *Id.* §§ 201-301 (current versions at 18 U.S.C. §§ 6001-6005 (1976); 28 *id.* § 1826).

18. *Id.* §§ 601-604 (current version at 18 U.S.C.A. § 3481 (West Supp. 1979) (note preceding)).

19. *Id.* § 801 (current version at 18 U.S.C. § 3575 (1976)).

The infiltration of legitimate businesses by organized crime was a serious concern, which was not reflected in the 1969 Act. Four principal methods by which organized crime gained control of legitimate businesses had been identified in 1967 by a presidential task force: investing concealed profits acquired from gambling and other illegal enterprises; accepting business interests in payment of the owner's gambling debts; foreclosing on usurious loans; and using various forms of extortion.<sup>20</sup> The Task Force Report provided impetus for Congress to deal with the infiltration of legitimate businesses, and in 1967 two bills were introduced in the Senate on this subject. Both bills, however, were directed at only one method of infiltration cited by the Report—investment. One bill was designed to amend the Sherman Act by prohibiting the investment of certain unreported income in any business enterprise affecting interstate or foreign commerce.<sup>21</sup> The other bill prohibited the investment of income derived from certain criminal activities in any business enterprise affecting interstate or foreign commerce.<sup>22</sup> The Antitrust Section of the American Bar Association agreed with the need for this type of legislation,<sup>23</sup> but felt that the Sherman Act should not be amended. Rather, the Antitrust Section asserted that a separate criminal provision, as in the latter bill, would more effectively deal with the problem.<sup>24</sup>

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20. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 4 (1967). An example of the use of extortion was the attempted takeover of a New York juke box distribution firm. A member of the syndicate demanded that the owner surrender one-fourth of the profits of his firm, and in return, the syndicate would "protect" the owner. The owner refused, and his wife was beaten and his daughter threatened. The syndicate members were eventually convicted of an extortion plot. 115 CONG. REC. 23569 (1969).

21. As introduced by Senator Hruska, S. 2048, 90th Cong., 1st Sess. (1967) made it a violation of the antitrust laws to use in one business the intentionally and deliberately unreported income derived from another business. The rationale for S. 2048 was the belief that the evil to be curbed was the unfair competitive advantage inherent in the large amounts of illicit income available to organized crime. 113 CONG. REC. 17997, 17999 (1967) (remarks of Sen. Hruska).

22. S. 2049, 90th Cong., 1st Sess. § \_\_\_\_ (1967). The criminal activities enumerated were of the type normally associated with members of organized crime, such as gambling, bribery, narcotics, and extortion. 113 CONG. REC. 17997 (1967). S. 2049, like title IX as enacted, also authorized the issuance of injunctions at the request of either the government or a private party, nationwide service of process, and private suits for treble damages. It also granted immunity from prosecution to witnesses testifying in proceedings instituted by the United States. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 555 (1969).

23. The Antitrust Section noted that some activities of organized crime in legitimate business had already been reached by existing antitrust laws. See *United States v. Bitz*, 282 F.2d 465, 466-67 (2d Cir. 1960).

24. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 557 (1969) (report of Antitrust Section of ABA). The Report added that the use of antitrust laws as a vehicle for combating organized crime could create serious obstacles for persons seeking treble damage recoveries because a very strict body of precedent exists in the antitrust law on this type of suit. *Id.* at 558.

These two bills died in committee, but on March 20, 1969, two months after the introduction of the Organized Crime Control Act of 1969,<sup>25</sup> Senators Hruska and Stevens introduced a replacement bill that prohibited the investment of money derived from enumerated criminal activities or the investment of any intentionally unreported income in any enterprise affecting interstate commerce.<sup>26</sup> The bill also authorized private suits for treble damages and injunctive relief. The Justice Department criticized this bill because of its narrowness of scope in only prohibiting investment, its failure to consider the control or operation of a business by means of racketeering activities, its failure to provide for forfeiture, and its failure to provide for civil investigative devices such as the investigative demand.<sup>27</sup> Accordingly, a new bill (S. 1861) was introduced as a final replacement.<sup>28</sup> This bill, to "prohibit the infiltration or

25. See text accompanying notes 14-19 *supra*.

26. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6925 (1969).

27. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969). Civil investigative demand is a term borrowed from antitrust law. The Justice Department is empowered under 15 U.S.C. §§ 1312-1314 (1976) to require parties under investigation to produce evidence for examination prior to the institution of any action.

28. S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9512 (1969). One difference between S. 1623 and S. 1861 is that S. 1623 refers to the infiltration of any business while S. 1861 refers to the infiltration of legitimate organizations. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 37, 61 (1969). The principal sections of S. 1861 provided:

§ 1861. Definitions

"As used in this chapter—

"(1) The term 'racketeering activity' means (A) any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under [enumerated provisions of title 18], and (C) any conspiracy to commit any of the foregoing offenses.

"(2) The term 'interstate commerce' means commerce within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or between any place in a State and any place in another State, or between places in the same State through another State.

"(3) The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

"(4) The term 'person' includes any individual or entity capable of holding a legal or beneficial interest in property.

"(5) The term 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

"(6) The term 'pattern of racketeering activity' includes at least one act occurring after the effective date of this chapter.

"(7) The term 'unlawful debt' means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate.

"(8) The term 'racketeering order' means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding

management of legitimate organizations" by means of racketeering activity as well as investment of the proceeds of racketeering activity in such organizations, was the forerunner of the current Racketeer Influenced and Corrupt Organizations Act. It included the remedy of divestiture as well as provisions for a civil investigative demand.<sup>29</sup>

In response to certain Justice Department suggestions,<sup>30</sup> S. 1861 was

arising under this chapter.

"(9) The term 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been engaged in any racketeering violation.

"(10) The term 'racketeering violation' means any act or omission in violation of this chapter or any racketeering order hereunder.

"(11) The term 'racketeering investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect this chapter.

"(12) The term 'documentary material' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

#### § 1962. Prohibited racketeering activities

"(a) It shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern by racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(b) It shall be unlawful for any person to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, through a pattern of racketeering activity or through collection of unlawful debt.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

*Id.* § 2, 115 CONG. REC. at 9569.

29. In commenting on the inadequacies of then current remedies, the President observed that

[t]he arrest, conviction and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.

*Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 449 (1969) (President's Message on Organized Crime). Private actions for damages were not provided for in S. 1861; nor did S. 1861 include acts related to dealing in narcotics in its definition of racketeering activity. These omissions were corrected later.

30. The Justice Department suggested that the definition of "racketeering activity" be redefined in § 1961(a) to mean "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury, or dealing in narcotic drugs, marijuana or other dangerous drugs, which is indictable under State law and punishable by imprisonment for more than 1 year." SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 122 (1969) [hereinafter cited as SENATE REPORT]. Their recommendation was followed in the Senate Judiciary Committee's version of title IX, though the phrase "dealing in narcotics or other dangerous drugs" was substituted for the phrase "dealing in narcotic drugs, marijuana or other dangerous drugs." *Id.* at 21-22; Act of Oct. 15, 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (current version at 18 U.S.C. § 1961(a) (1976)).

amended somewhat and included as title IX of the Organized Crime Control Act,<sup>31</sup> which passed the Senate on January 23, 1970, as the Organized Crime Control Act of 1970. The House version of the bill, which adopted relatively minor revisions,<sup>32</sup> passed on October 7, 1970,

An amendment to § 1961(6) was offered to define "pattern of racketeering activity" as requiring at least two acts of racketeering, rather than one act. SENATE REPORT, *supra*, at 122. This amendment was adopted in the Senate Judiciary Committee's version of title IX. 18 U.S.C. § 1961(6) (1976); SENATE REPORT, *supra* at 22. Section 1962(a) was criticized because it was not clear whether the prohibition against the investment of certain types of income was aimed at the active participant in illegal enterprises or persons who merely did business with such a participant, or both. *Id.* at 122. The Judiciary Committee followed the Department of Justice's recommendation and amended § 1962(a) to include "in which such person has participated as a principal." *Id.* at 22, 23. This indicates the narrow scope of the statute. The Justice Department also suggested that the total ban on the acquisition of any interest in an enterprise provided in § 1962, which included the acquisition of even one share of stock, was largely unnecessary. *Id.* at 123. The Department's suggestion was followed in title IX, which provided that the purchase of securities that did not amount to one percent of the outstanding securities of any one class was not unlawful. *Id.* at 23.

31. Other changes included changing the word "indictable" used in S. 1861, § 1961(a) to the word "chargeable" in § 901(a) of title IX. SENATE REPORT, *supra* note 30, at 21. In § 1962(a) the term "knowingly" was eliminated. *Id.* at 22. The definition of racketeering activity was expanded to include other acts indictable under provisions of title 18. New provisions included § 1341 (mail fraud), § 1343 (wire fraud), § 1511 (obstruction of state or local law enforcement), § 1953 (interstate transportation of wagering paraphernalia), and § 1955 (prohibition of illegal gambling businesses). *Id.* at 21. Section 901(a) of title IX added the phrase "[a]ny offense involving bankruptcy fraud, fraud in the sale of securities, or the manufacture, importation, receiving, concealment . . . or otherwise dealing in narcotic or other dangerous drugs punishable under any law of the United States" to the § 1961(d) definition of racketeering activity. *Id.* at 22. A conspiracy subsection was added to § 1962, which read: "[I]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." *Id.* at 22. Subsection 1962(e) was added to provide that a violation of § 1962 would continue so long as the person committing the violation continued to receive any benefit from it. *Id.* at 23.

32. The American Bar Association recommended amending title IX to allow private actions for damages and § 1967 to give the court, in any proceedings instituted by the United States under title IX, discretion to decide which proceedings should be open to the public. *Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 559 (1970). For the adopted versions, see 18 U.S.C. § 1964(c) (1976); HOUSE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, H. REP. NO. 1549, 91st Cong., 2d Sess. 18, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4034 and 18 U.S.C. § 1961(6) (1976); HOUSE REPORT, *supra*, at 16.

The Nevada Gaming Association objected on the ground that the definition of unlawful debt turned not on whether the debt was incurred in illegal gambling activity, but rather on whether the debt was unenforceable under state or federal law. While gambling is legal in Nevada, gambling debts are not enforceable in civil actions. *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 27, 359 P.2d 85, 86 (1961). Thus, licensed gambling establishments that engaged in any collection activity or that invested the proceeds of a gambling debt would violate § 1962 of S. 30. *Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 466 (1970) (statement of Gaming Industry of Nevada). The section was revised to provide:

Unlawful debt means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a state or political subdivision thereof, or which is unenforceable under state or federal law . . .



was approved by the Senate on October 12, and was signed into law by the President on October 15, 1970.<sup>33</sup>

The criminal portion of RICO is divided into three sections (which are set out in the Appendix to this Article): section 1961, which sets out the definitions;<sup>34</sup> section 1962, the operative section, which specifies "prohibited activities";<sup>35</sup> and section 1963, which provides criminal penalties for violation of section 1962.<sup>36</sup> The stated purpose of RICO is "the elimination of infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."<sup>37</sup> To accomplish this goal, three categories of activities are prohibited by section 1962:<sup>38</sup> (1) subsection 1962(a) makes it unlawful to invest funds derived from a pattern of racketeering activity as defined in subsections 1961(1) and (5), or derived from the collection of an unlawful debt as defined in subsection 1961(6), in any enterprise engaged in interstate or foreign commerce; (2) subsection 1962(b) prohibits acquisition or maintenance of an enterprise through the proscribed pattern of racketeering activity or collection of an unlawful debt; (3) subsection 1962(c) prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt. Subsection 1962(d) makes conspiracy to violate subsections (a), (b), or (c) equally subject to the sanctions of the penalty clauses. Thus, the three substantive sections prohibit, in essence, the investment of "dirty" money by racketeers, the takeover or control of an

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because of the laws relating to usury.

HOUSE REPORT, *supra* at 16.

The House version also omitted, without explanation, § 1962(e). *See* notes 22, 31 *supra*. The House version of title IX amended § 1961(1)(B) adding the phrase "if the act indictable under section 659 is felonious" to the reference to § 659 (relating to theft from interstate shipment). HOUSE REPORT, *supra* at 16, [1970] U.S. CODE CONG. & AD. NEWS at 4032. Also, in § 1961(5), dealing with a "pattern of racketeering activity," the phrase "[a]nd the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity" was added. *Id.* at 16, [1970] U.S. CODE CONG. & AD. NEWS at 4032.

Two other amendments to title IX were offered on the floor of the House on October 7, 1970. Congressman Mikva suggested that persons who brought frivolous suits or suits for the purpose of harassment under § 1964(c) should be subject to treble damages for injury to the defendant. He said the amendment was necessary to protect innocent businessmen from competitors who would abuse § 1964(c) in order to do damage. The amendment was rejected. 116 CONG. REC. 35342 (1970).

Congressman Biaggi offered an amendment that would have made it "unlawful for any person to be a member of a Mafia or La Cosa Nostra organization." These organizations were defined so as to apply only to people of Italian ancestry. 116 CONG. REC. 35343 (1970). The constitutional soundness of the proposed amendment was questioned in light of Supreme Court decisions such as *Scales v. United States*, 367 U.S. 203 (1961) and *Robinson v. California*, 370 U.S. 660 (1962). The amendment was rejected. 116 CONG. REC. 35346 (1970).

33. 116 CONG. REC. 35340, 35347 (1970).

34. *See* 18 U.S.C. § 1961 (1976), reproduced at Appendix *infra*.

35. *See id.* § 1962, reproduced at Appendix *infra*.

36. *See id.* § 1963, reproduced at Appendix *infra*.

37. SENATE REPORT, *supra* note 30, at 76.

38. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 17, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4033.

interstate business through racketeering, and the operation of such a business through racketeering.

Although RICO was aimed at organized crime, it encompasses a wide range of criminal activities and consequently applies to many individuals who are not associated with any criminal organization. Congress was well aware of this fact, but felt that unless the predicate acts were defined broadly, they would not adequately cover the wide range of activities dominated by organized crime.<sup>39</sup> Still, the stated aim of RICO is to prevent the takeover or use of legitimate businesses by organized crime. There is no indication that RICO was designed to provide increased penalties for racketeering activities, to forbid infiltration of governmental agencies, or to greatly increase the scope of criminal conspiracy, yet it has been interpreted by the courts as doing all those things.<sup>40</sup> The following analysis of the individual subsections will attempt to demonstrate the intended scope of each part of RICO and how the courts, in their fear of the menace of organized crime, have gone far beyond what Congress intended.

## II. SECTION 1961:<sup>41</sup> ISSUES PRESENTED BY THE RICO DEFINITIONS

The key to understanding RICO is to understand the definitions. Several terms that appear in the statute are not common in statutory

39. As Senator McClellan, the sponsor of the bill, explained:

The bar committee [of the City of New York] complains that the list is too inclusive, since it includes offenses which often are committed by persons not engaged in organized crime. The Senate report does not claim, however, that the listed offenses are committed *primarily* by members of organized crime. . . .

. . . It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well . . . .

. . . .

. . . Title IX's list does all that can be expected . . . it lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is [small] . . . . Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties*, 46 N.D. LAW. 55, 142-44 (1970) (footnote omitted) (expansion of Senator McClellan's remarks on Senate floor, see 116 CONG. REC. 18940 (1970)).

40. See notes 108-14, 118-30 & 216-31 *infra* and accompanying text.

41. Section 1961 provides, in pertinent part, the following definitions:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894

usage and have caused the courts to break new ground in statutory interpretation. This part of the Article will present the statutory definition of each significant term in light of any pertinent legislative history.<sup>42</sup> Then, through an analysis of frequently conflicting court decisions, an attempt will be made to interpret the definitions of RICO in a way that most accurately reflects the congressional intent, as necessarily limited by applicable constitutional provisions.

*A. Subsection 1961(1): Racketeering Activity*

"Racketeering activity" is defined in subsection 1961(1) as:

(A) any act or threat involving [enumerated offenses] which is chargeable under State law and punishable by imprisonment

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(relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C.A. § 1961(1)-(6) (West Supp. 1979).

42. See text accompanying notes 43-170 *infra*.

for more than one year; (B) any act which is indictable under [enumerated] provisions of title 18, United States Code . . . ; (C) any act which is indictable under [the enumerated provisions of] title 29, United States Code . . . , or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or [enumerated narcotics offenses] punishable under any law of the United States.<sup>43</sup>

In the original bill (S. 1861) subsection (1)(A) defined racketeering activity as "any act involving danger of violence to life, limb, or property indictable under State or Federal law and punishable by imprisonment for more than one year."<sup>44</sup> The Justice Department asserted that this definition was "too broad and would result in a large number of unintended applications as well as tending toward a complete federalization of criminal justice."<sup>45</sup> Accordingly, the Justice Department recommended a change in what is now subsection 1961(1)(A) to roughly its present form<sup>46</sup> in which a series of specific offenses are enumerated.<sup>47</sup>

Although it is now fairly clear which offenses are to be included within the term "racketeering activity,"<sup>48</sup> Congress left unclear the meaning of the terms "chargeable under State law" in subsection 1961(1)(A) and "indictable under [enumerated] provisions of Title 18 United States Code" in subsection 1961(1)(B). One major question has been litigated:<sup>49</sup> whether the pattern offenses<sup>50</sup> must have been "chargeable" (or indictable) at the time they were committed,<sup>51</sup> at the time of

43. 18 U.S.C. § 1961(1) (1976).

44. See SENATE REPORT, *supra* note 30, at 121 (letter from Kleindienst to McClellan); note 30 *supra*.

45. *Id.* at 121-22.

46. The Justice Department later added "dealing in . . . marijuana" as one of the specifically covered offenses and used "indictable" where "chargeable" appears in the final version. SENATE REPORT, *supra* note 30.

47. See 18 U.S.C. § 1961(1)-(6) (West Supp. 1979), reproduced at Appendix *infra*.

48. The difficulties in applying the provisions of §§ 1962(a), (b), and/or (c) to certain predicate offenses will be a recurring theme of this Article.

49. Another issue, which has not been the subject of litigation, is raised by the use of the term "chargeable" when referring to state law violations and the term "indictable" when referring to federal law violations. The legislative history is silent as to the reason for the choice of differing provisions. The only reason that seems likely is that, because the specific federal offenses were all known to be indictable, the more precise term was applied to them. Because the state offenses were stated generically, the use of the language "chargeable" and "punishable by imprisonment for more than one year" encompassed all offenses that under federal law would have been indictable felonies, but that under the procedures of a particular state might be indictable or designated as felonies. Thus, the term "chargeable" was apparently chosen to ensure that a defendant would not escape punishment because of a technicality of a particular state's law, and the two terms seem to have the same meaning. See *United States v. Davis*, 576 F.2d 1065, 1066-67 (3d Cir. 1978); cf. *United States v. Kaye*, 556 F.2d 855, 859-60 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977) (concluding that Congress made a mistake in using "indictable" as applied to the federal offenses).

50. A "pattern offense" is one of the offenses enumerated in the subsections of RICO, which make up the "pattern of racketeering activity."

51. See notes 53-59 *infra* and accompanying text.

the RICO indictment,<sup>52</sup> or, as this Article suggests, at the time the RICO violation was completed.<sup>53</sup>

It has been argued that if the statute of limitations on the pattern offenses expired prior to the RICO indictment, the offenses may not still be considered "chargeable" or "indictable" for the purpose of constituting "racketeering activity" under the RICO definition. In *United States v. Forsythe*<sup>54</sup> the Court of Appeals for the Third Circuit considered a case in which the state two-year statute of limitations had expired on the pattern offense prior to the RICO indictment.<sup>55</sup> The court held that the five-year federal statute of limitations was applicable to the pattern offense because the state law offenses were not the "gravamen" of RICO, but were merely included for definitional purposes.<sup>56</sup> The Third Circuit claimed to reaffirm *Forsythe* in *United States v. Davis*,<sup>57</sup> which presented the same issue: whether the words "'chargeable under State law' . . . mean 'chargeable under State law at the time the [state] offense was committed,'"<sup>58</sup> or whether the state offense must still be chargeable at the time of the RICO indictment. The Third Circuit concluded that the requirements of RICO were satisfied by a state law offense that was chargeable at the time it was committed.<sup>59</sup>

An alternative interpretation, adopted by Judge Aldisert concurring in *Davis*, is that "chargeable" means that the offense must be chargeable at the time of the RICO indictment.<sup>60</sup> Judge Aldisert accused the majority of "statutory construction in the . . . fabricating sense" for overlooking the plain language of the statute, which pertains to an offense that "is chargeable" under state law.<sup>61</sup>

52. See text accompanying notes 60-65 *infra*.

53. See text accompanying notes 66-71 *infra*.

54. 560 F.2d 1127 (3d Cir. 1977).

55. *Id.* at 1134.

56. *Id.* at 1134-35. The court concluded that the elimination of a proposed § 1962(e) from RICO was significant. Section 1962(e) would have provided that a RICO offense would continue so long as the person committing it received any benefits from the violation. The unexplained elimination of this provision from the final bill led the court to conclude that § 3282 was applicable to the state law pattern offenses. *Id.* at 1134.

57. 576 F.2d 1065 (3d Cir. 1978); *accord*, *United States v. Fineman*, 434 F. Supp. 189, 194 (E.D. Pa. 1977). See also *United States v. Salinas*, 564 F.2d 688, 692-93 (5th Cir. 1977) (quoting *Forsythe* with approval in slightly different context); text accompanying notes 165-70 *infra*.

58. 576 F.2d at 1067.

59. *Id.* If, as it appeared, *Forsythe* applied a five-year statute of limitations to the predicate state offenses, *Davis* overruled *Forsythe*; the court in *Davis* did not reaffirm *Forsythe*, as the court claimed to do. If the only requirement is that the state law offenses had been chargeable at the time they were committed, as *Davis* holds, it is irrelevant how much time has passed between the state law offense and the RICO indictment. The only pertinent statute of limitations question is how much time has passed since the proceeds of racketeering activity were invested (§ 1962(a)), since an enterprise was acquired through racketeering activity (§ 1962(b)), *etc.* The question, in short, is how much time has passed since the RICO offense was completed.

60. *Id.* at 1068 (Aldisert, J., concurring). See also *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting).

61. 576 F.2d at 1069 (Aldisert, J., concurring) (emphasis original).

A reading of the statute in its entirety is instructive. The juxtaposition of subsections 1961(1)(a) and 1962(c), as applied in *Davis* (which involved bribery charges under Pennsylvania law),<sup>62</sup> provides in effect that it shall be unlawful for any person to conduct the affairs of an enterprise engaged in interstate commerce through two or more acts of bribery that *are* chargeable under state law.<sup>63</sup> As Judge Aldisert noted, if Congress had wanted to refer to conduct chargeable at the time of the offense, it could have said so explicitly, namely: two or more acts of bribery that were chargeable under state law *at the time they were committed*.<sup>64</sup> It can be even more strongly argued that the statutory provision is at least unclear and, applying the rule of lenity,<sup>65</sup> should be construed in favor of the defendant.

Actually, the most satisfactory reading of the statute is a middle ground. The use of the present tense ("is chargeable") language in subsection 1961(1) could be read, as Judge Aldisert suggests, to refer to "chargeable" *at the time of the RICO indictment*, or it could be read to refer to "chargeable" *at the time the defendant completed the violation of RICO*.<sup>66</sup> This latter view would seem to reflect Congress' legitimate concern: determining defendants' status at the time they commit the additional act that constitutes a violation of federal law. If the defendants have been acquitted of a state law extortion offense before they use money from that alleged extortion to take over an interstate business, they cannot be convicted of a subsection 1962(a)<sup>67</sup> RICO violation.<sup>68</sup>

62. *Id.* at 1066.

63. *Id.* at 1069 (Aldisert, J., concurring).

64. *Id.* (Aldisert, J., concurring). Consider also, §§ 1961(1)(A) and 1962(a), similarly parsed: "it shall be unlawful for any person who has received any money from two or more bribery offenses that are chargeable under state law, to invest such money, . . . ." 18 U.S.C. § 1962(a) (1976).

65. See *United States v. Bass*, 404 U.S. 336, 347-48 (1971).

66. 576 F.2d at 1069 (Aldisert, J., concurring).

67. Section 1962(a) forbids the investment of the proceeds of racketeering activity in an enterprise that affects interstate commerce.

68. This problem cannot arise under § 1962(b)-(c) because the RICO violation and the state law violation must by definition occur simultaneously. Thus, RICO is violated only "through" a pattern of state law violations. Section 1962(a), by contrast, requires first a state law violation and then certain additional acts that constitute the RICO offense. The potential defendants therefore have an opportunity to contemplate whether or not their proposed course of conduct—investing in an enterprise—is illegal. The argument that Congress did not intend RICO to apply to individuals no longer chargeable at the time they invest in an "enterprise" is bolstered by due process considerations. How are the defendants to determine that the federal government considers them "chargeable" for state offenses for which they were acquitted? It is like requiring a doctor, on pain of criminal prosecution, to determine whether "there is sufficient reason to believe that the fetus may be viable," a statutory provision struck down in *Colautti v. Franklin*, 439 U.S. 379, 391-93 (1979).

Similar to the statute in *Colautti*, RICO "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Id.* at 683 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). Indeed, potential RICO violators are treated even more unfairly because they have received an authoritative opinion from the state authorities that they are *not* chargeable with a state offense. Thus, the view of the Third Circuit in *Davis* raises serious constitutional problems. On

They were not "chargeable" with any state law offense at the time of the RICO violation.

The view that RICO was not designed to be limited to offenses chargeable at the time of the RICO indictment (contrary to Judge Aldisert's contention) is bolstered by a consideration of subsection 1961(5), which provides that the

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.<sup>69</sup>

If it were intended that no criminal act on which the statute of limitations had expired at the time of the RICO indictment could be part of the pattern, the ten-year provision in this subsection would be largely meaningless. The five-year federal statute of limitations and the statutes for most state crimes would require the pattern acts to have occurred within five years or less of the RICO indictment—a result exactly contrary to the purpose of subsection 1961(5). Thus, it must be concluded that Congress meant that defendants could be prosecuted under RICO if they were chargeable with two or more pattern offenses at the time they committed the other elements of the RICO violation.

Since RICO requires the commission of an additional act—such as investing in an enterprise or taking over an enterprise—beyond the pattern offenses, it follows that a prior acquittal of the pattern offenses does not bar a RICO prosecution on double jeopardy grounds.<sup>70</sup> The jury in the RICO case must find only that the defendants were chargeable with

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the other hand, if the defendants commit the state law violation and invest the money (in violation of § 1962(a) of RICO) *before* their state court acquittal, the RICO jury can easily find that, despite their subsequent acquittal, the defendants were "chargeable" under state law at the time of the RICO offense, and they therefore violated § 1962(a).

69. 18 U.S.C. § 1961(5) (1976).

70. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This was the view of the Third Circuit in *United States v. Frumento*, 563 F.2d 1083, 1088-89 (3d Cir. 1977). However, the court based its decision on the dual sovereignty doctrine of *Abbate v. United States*, 359 U.S. 187, 194-95 (1959).

*Abbate* is not applicable here because the availability of a RICO charge after acquittal of the state pattern offenses does not depend on dual sovereignty, rather, it depends on the fact that RICO requires additional conduct beyond that required to violate state law. It is not, as in *Abbate*, a reprosecution of essentially the same offense in another forum. It is a completely independent charge. Thus, even if, as Judge Aldisert posited, in *Frumento*, 563 F.2d at 1099 (Aldisert, J., dissenting), the Supreme Court were to overrule *Abbate*, the result in *Frumento* should be the same—a state court acquittal of the pattern offenses does not bar a subsequent RICO conviction *unless* the acquittal occurred before the RICO violation was committed.

Similarly, a prior acquittal of *federal* pattern offenses would not necessarily bar a RICO prosecution or conviction, though the collateral estoppel principle of *Ashe v. Swenson*, 397 U.S. 436, 441-45 (1970), would normally render such a charge impossible to establish. See *United States v. Frumento*, 409 F. Supp. 136, 141 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977).

the predicate offenses at the time they committed the RICO violation.<sup>71</sup>

### B. Subsection 1961(4): Enterprise

RICO explicitly prohibits investing racketeering money or money derived through collection of an unlawful debt in an "enterprise" that is engaged in, or the activities of which affect, interstate commerce;<sup>72</sup> it also prohibits the acquisition or operation of such an "enterprise" through a pattern of racketeering activities or through collection of an unlawful debt.<sup>73</sup> Subsection 1961(4), which remains unchanged from its original form in S. 1861,<sup>74</sup> provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity."<sup>75</sup> Two questions have been raised in the courts of appeals concerning the scope of this definition: First, is the enterprise limited to legitimate businesses or can the enterprise that is affected by the racketeering activity be an illegal enterprise?<sup>76</sup> For example, if racketeers operate an illegal gambling business through a pattern of racketeering activities, can they be prosecuted under RICO? Second, can the enterprise be a governmental agency, such as a police department?<sup>77</sup>

#### 1. Legitimate or Illegitimate "Enterprises"

At first glance, the definition of enterprise would appear to embrace an illegal as well as a legal enterprise. An illegal gambling operation, for instance, would be a "group of individuals associated in fact although not a legal entity."<sup>78</sup> This language has led the courts of appeals that have considered the issue to conclude, with one recent

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71. While it may be argued that a finding that they were "chargeable" does not necessarily amount to a finding that they "committed" the predicate offenses, this is apparently what Congress intended and, though the issue has not been raised, is the meaning the courts have attributed to the statute. Thus, in *United States v. Frumento*, 409 F. Supp. 136 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), the court found that RICO "requires a showing of at least two separate instances of racketeering activity." *Id.* at 139. The issue has never been specifically discussed, but the government's proof in every case is to the effect that defendants actually committed the pattern crimes.

This view is consistent with legislative history. The Senate Report stated: "A 'racketeering activity' . . . must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute." See SENATE REPORT, *supra* note 35, at 158.

72. 18 U.S.C. § 1962(a) (1976).

73. *Id.* § 1962(b).

74. Compare S. 1861, 91st Cong., 1st Sess. § 2(a) (1969) with 18 U.S.C. § 1961(4) (1976).

75. 18 U.S.C. § 1961(4) (1976).

76. See notes 78-114 *infra* and accompanying text.

77. See notes 115-32 *infra* and accompanying text.

78. 18 U.S.C. § 1961(4) (1976).



exception,<sup>79</sup> that the statute does cover illegal as well as legal enterprises,<sup>80</sup> a view that conflicts sharply with the legislative history.<sup>81</sup>

While a statement of congressional purpose is not necessarily dispositive,<sup>82</sup> it nevertheless is instructive. Congress was very explicit about the purpose of RICO: "the elimination of the infiltration of organized crime and racketeering into *legitimate organizations* operating in interstate commerce."<sup>83</sup> Despite this clear statement of congressional intent, the first court of appeals to consider the issue, the Court of Appeals for the Seventh Circuit, found in *United States v. Cappetto*<sup>84</sup> that "[b]oth the statutory language and the legislative history" supported the notion that "enterprise" included illegitimate as well as legitimate concerns.<sup>85</sup> However, the only legislative history cited in support of this assertion is a statement from the Senate Report that

[a] more effective effort must be mounted to eliminate illegal

79. *United States v. Sutton*, 605 F.2d 260, 263 (6th Cir. 1979). See also *United States v. Rone*, 598 F.2d 564, 574 (9th Cir. 1979) (Ely, J., dissenting); *United States v. Altese*, 542 F.2d 104, 108 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977); Note, Elliott v. *United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109, 114 (1979); Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. PA. L. REV. 192, 201 (1975). In *Iannelli v. United States*, 420 U.S. 770 (1975), the Supreme Court, in dictum, recognized the more limited scope of the statute. *Id.* at 787 n.19.

80. Four circuits and one district court in another circuit have concluded that an illegal enterprise is included in this definition. See *United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979); *United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Fineman*, 434 F. Supp. 189, 193 (E.D. Pa. 1977). See also *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978).

81. See *United States v. Sutton*, 605 F.2d 260, 266-69 (6th Cir. 1979); text accompanying notes 82-101 *infra*.

82. The statute may, by its language, perform an additional function beyond the stated purpose. On the other hand, "[i]f an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered." *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971).

83. SENATE REPORT, *supra* note 30, at 76 (emphasis added). Similarly, the section analysis states: "Section 1962 establishes a threefold prohibition aimed at the infiltration of legitimate organizations." *Id.* at 159. The language of the House Report is identical. See H.R. REP. NO. 15499, 91st Cong., 2d Sess. 17, reprinted in [1970] U.S. CODE CONG. & AD. NEWS, 4007, 4033. Indeed, the original bill (S. 1861) was called: "A bill . . . to prohibit the infiltration or management of legitimate organizations by racketeering activity . . ." 115 CONG. REC. 9512 (1969). Every pertinent reference to the bill in congressional reports or debate declares that the purpose of the bill was to prevent infiltration of legitimate business. For a summary of legislative intent, see *United States v. Moeller*, 402 F. Supp. 49, 58-59 n.8 (D. Conn. 1975).

In fact, at the time the bill was pending, the Justice Department believed it only applied to legitimate organizations. Commenting on the bill at the Senate Hearings, Assistant Attorney General Wilson described it as "designed to attack the infiltration of legitimate business by organized crime." *Hearings Before the Subcomm. on Criminal Laws and Procedure of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969).

84. 502 F.2d 1351 (7th Cir. 1974).

85. *Id.* at 1358.

gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly the substantial business enterprises of gambling . . . .<sup>86</sup>

The quoted language indicates a congressional intent to prohibit directly the business of gambling. What the court failed to point out is that the quoted language does not deal with RICO (title IX) at all, but rather with title VIII,<sup>87</sup> in which Congress specifically prohibited the business of gambling.<sup>88</sup> Thus, the court in *Cappetto* incorrectly attributed the legislative history of title VIII to RICO and thereby construed the subsection 1961(4) definition of enterprise as including both legal and illegal organizations.

The courts of appeals of other circuits that subsequently considered the issue relied on *Cappetto* in reaching, without extended discussion, the same conclusion.<sup>89</sup> More significantly, the other courts did not require more than a series of unconnected illegal acts to find that an enterprise existed.<sup>90</sup> In defining the enterprise in this way, the courts

86. *Id.* (quoting SENATE REPORT, *supra* note 30, at 73).

87. 18 U.S.C. § 1955 (1976).

88. 18 U.S.C. § 1955(a) (1976) provides that “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years or both.” This statute represents a departure from prior federal law, which had never forbade gambling operations per se, but had prohibited the use of interstate facilities in connection with gambling.

The court in *Cappetto* further evidenced its misunderstanding of the statute by conceding that § 1962(a) was only designed to deal with legal enterprises, while §§ 1962(b) and (c) were designed to deal with both legal and illegal enterprises. See 502 F.2d at 1358. To the contrary, whatever the scope of the term “enterprise,” it is clear that it is the same in all three subsections, because the term, as defined in § 1961(4), is applied to §§ 1962(a), (b), and (c).

89. See cases cited at note 90 *infra*.

90. In *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), a civil forfeiture case under § 1964 involving an illegal gambling business, the pattern offenses were “participating . . . in an illegal gambling business violative of Section 1955.” *Id.* at 1355. The same was true in *United States v. Altese*, 542 F.2d 104, 105 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). In *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977), the enterprise was simply a series of four bribes paid to the defendant (a legislator) by coconspirators from the parents of students who wanted the defendant to use his influence to have their children admitted to graduate schools in the state. These same bribes were the pattern offenses. *Id.* at 192.

In *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), the enterprise was nothing more than a series of illegal acts performed by a large number of individuals who knew each other and associated in various combinations to perform their illegal deeds, but were not formally or informally connected in any sort of organization. *Id.* at 884-87; see text accompanying notes 217-31 *infra*. Similarly, in *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), the enterprise was a series of three murders and two extortions committed by two unrelated individuals. *Id.* at 566. See also *United States v. McLaurin*, 557 F.2d 1064, 1066-67 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); *United States v. Morris*, 532 F.2d 436, 438 (5th Cir. 1976).

All of these cases used the pattern offenses to define the enterprise. And, with the exception of the gambling cases, only a series of crimes was involved; there was no enterprise in the usual sense of the word.

have tacitly made an additional finding that the enterprise can be defined by reference to the pattern crimes themselves. For example, in *United States v. Altese*<sup>91</sup> and in *Cappetto*<sup>92</sup> the courts initially found a series of gambling violations and then held that proof of those *same violations* established the existence of an enterprise.<sup>93</sup> Thus, operation of an illegal gambling enterprise that necessarily involves committing a "pattern" of gambling violations would give rise to prosecution for the gambling violations themselves, as well as to prosecution under RICO. In *United States v. Elliott*<sup>94</sup> and in *United States v. Rone*<sup>95</sup> there was no "business" at all—nothing more than a series of essentially unrelated pattern offenses was used to define the enterprise.<sup>96</sup> Thus, the courts have read the enterprise element out of the statute; in their view, a pattern of racketeering activities *is* the enterprise.

Finally, in *United States v. Sutton*<sup>97</sup> the Court of Appeals for the Sixth Circuit recognized that the other courts, perhaps more influenced by their hostile attitude toward racketeers than by a common sense reading of the statute, had, in effect, eliminated the enterprise element by defining the enterprise solely in terms of the pattern crimes.<sup>98</sup> The Sixth Circuit's solution to the problem in *Sutton* was to conclude that the enterprise must be something more than, and separate from, the pattern crimes.<sup>99</sup> The court reasoned:

Surely, the draftsmen would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more. A straight-forward prohibition against engaging in "patterns of racketeering activity" would have sufficed and there would have been no need for reference to "enterprises" of any sort.<sup>100</sup>

However, the Sixth Circuit concluded that enterprise is limited to entities that are "organized and acting for some ostensibly lawful purpose."<sup>101</sup> This goes too far. While it is in keeping with the congressional purpose as stated in the legislative history, it is not mandated by the words of the statute. If a loan shark uses the profits of the loan-sharking activity to buy an illegal gambling enterprise, the enterprise has an independent existence from the racketeering activity, and RICO can appropriately be enforced without reading the term enterprise out of the statute. That is, the government can show, as the statute requires, that

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91. 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

92. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

93. 542 F.2d at 106-07; 502 F.2d at 1358.

94. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

95. 598 F.2d 564 (9th Cir. 1979).

96. *Id.* at 568; 571 F.2d at 898-99.

97. 605 F.2d 260 (6th Cir. 1979).

98. *Id.* at 265.

99. *Id.* at 266.

100. *Id.*

101. *Id.* at 270.

the defendant has invested income derived from racketeering activity into a gambling enterprise that affects interstate commerce in violation of subsection 1962(a). Nothing in the language of the statute requires that the enterprise be "ostensibly legitimate" as the Sixth Circuit requires and as the legislative history suggests.<sup>102</sup> On the other hand, to allow a RICO prosecution to arise out of the simple operation of a gambling business with no showing that some separate enterprise is being acquired or operated "through" the gambling activities (as the majority of the courts have done) defies both the language *and* the legislative history of RICO.

Not only has the majority view expanded RICO beyond the congressional intent, it also has created problems under the double jeopardy clause. A concrete example will illustrate why this is true. Suppose five persons conduct a gambling operation that acquires \$2000 on a given day. This operation would thereby violate 18 U.S.C. § 1955.<sup>103</sup> It would also, by the definition in section 1955, violate state gambling laws. Once this is determined, a RICO violation has also, automatically, been established if the court accepts the majority view that the gambling operation can be the enterprise. That is, the defendants have conducted or participated in a gambling enterprise that affects interstate commerce<sup>104</sup> through a pattern of two gambling offenses (one state, one federal) in violation of subsection 1962(c). Since, under the rule of *Abbate v. United States*,<sup>105</sup> the two gambling offenses may be considered separate crimes for double jeopardy purposes,<sup>106</sup> it follows that they may be separate crimes for the purposes of establishing the necessary two RICO pattern offenses. Thus, commission of a section 1955 violation, without more, is also a RICO offense, in violation of the double jeopardy clause as explicated in *Blockburger v. United States*.<sup>107</sup> The RICO charge, in effect, reads: Defendant has conducted the affairs of a gambling enterprise that affects interstate commerce through a pattern of conducting a gambling business in violation of 18 U.S.C. § 1955 and of gambling in violation of state law. This is a meaningless rendition of

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102. See notes 82-83 *supra* and accompanying text.

103. 18 U.S.C. § 1955(a) (1976) provides that whoever conducts an illegal gambling business shall be fined, etc. "Illegal gambling business" is defined as a gambling business that (1) is in violation of state law, (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of the business, and (3) has a gross revenue of \$2000 in any single day or operates continuously for over 30 days. *Id.* § 1955(b).

104. Congressional findings have established that such gambling operations automatically affect interstate commerce, thereby satisfying § 1955. SENATE REPORT, *supra* note 30, at 16. Indeed, any of the federal pattern offenses will satisfy this element, thus effectively reading it out of the statute as well.

105. 359 U.S. 187 (1959).

106. *Id.* at 195-96.

107. 284 U.S. 299, 304 (1932). The test is "whether each provision requires proof of a fact which the other does not." *Id.* While RICO appears to require proof of facts that § 1955 does not require, it does not do so if enterprise is defined by reference to the pattern offenses.

the statute that turns a five-year felony under section 1955 into a twenty-year felony under RICO with proof of *no* additional facts, which clearly violates *Blockburger*.

A similar analysis can be applied to any of the federal violations enumerated in subsection 1961(1)(B), which also violate the state laws enumerated in subsection 1961(1)(A), including bribery, extortion, and narcotic offenses. Even when two federal violations form the pattern (such as two separate violations of section 1955), the result goes beyond the congressional purpose, although it does not technically create double jeopardy problems. Thus, if the gambling operation commits two section 1955 violations, it has also automatically violated subsection 1962(c), because the gambling enterprise has been "operated through a pattern" of gambling activity. It defies reason to suppose that Congress, without saying so, created RICO to punish *two* gambling offenses with an additional twenty years of imprisonment where one such offense would result in only a five-year imprisonment. To the contrary, the obvious purpose of RICO was to prevent gamblers from branching out into *other* activities, not to punish them additionally for operating a gambling business "through a pattern" of gambling activities.<sup>108</sup>

The use of the pattern offenses as the enterprise has the additional result of extending RICO to cover offenses in which Congress specifically disclaimed any interest. For instance, Congress dealt only with large-scale gambling in section 1955, intending to leave so-called "mom and pop"<sup>109</sup> gambling to the states. But since RICO also embraces gambling

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108. The problem is even more acute for the offender when other pattern offenses are considered. For instance, in Indiana a person who "knowingly engages in bookmaking" is guilty of a felony. IND. CODE § 35-45-5-3 (Supp. 1978). While it is obviously possible to commit but a single act of bookmaking, it is hard to imagine a bookmaker being arrested without having committed a series of such acts. Any two such acts that are chargeable under state law (and subject to two years imprisonment each) would thus define a "pattern of racketeering activity" and an "enterprise," see 18 U.S.C. § 1962 (1976), and the government would need only to show some affect on interstate commerce to turn a relatively minor state law violation into a 20-year federal felony.

Because some effect on interstate commerce can be shown in even the most localized gambling operation, see, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 241-42 (1972) (purchase of Illinois Sports News—scratch sheet—by Indiana bookmaker enough to establish interstate element of 18 U.S.C. § 1952 (1970)), the reach of RICO has been extended, despite an express disclaimer by Congress, see note 109 *infra*, to cover every two-bit bookmaker and numbers runner who can be shown to be chargeable with two such offenses.

Similarly, any two acts of uttering counterfeit money, 18 U.S.C. § 472 (1976), or two mailings in a mail fraud scheme, *id.* § 1341, would automatically activate RICO, despite the fact that no mail fraud or counterfeit scheme ever consists of only a single uttering or mailing. RICO thus serves as a device for pyramiding penalties rather than for prohibiting any substantive wrongful behavior.

109. See 116 CONG. REC. 18938-39 (1970) (remarks of Sen. McClellan) (responding to criticisms of broad reach of S. 30).

prohibited by state law, if the "mom and pop" operation is considered an enterprise under RICO, two violations of state gambling laws become subject to federal prosecution and penalties of twenty years and a \$25,000 fine.<sup>110</sup> By holding that the RICO enterprise can be an illegal gambling operation prohibited by state law, the courts have "overruled" Congress.

When the "unlawful debt" provisions of section 1962 of RICO are considered,<sup>111</sup> additional double jeopardy problems arise. Suppose an individual is a loan shark in violation of 18 U.S.C. §§ 891-894. If the enterprise requirement of RICO is satisfied by the loan-sharking operation itself, any violation of section 894 will automatically result in a violation of subsection 1962(c) as well,<sup>112</sup> since it is essentially impossible to violate section 894 by any other means than "through the collection of an unlawful debt." If so applied, the RICO statute would become a tautology that fails to satisfy the *Blockburger* test and therefore violates the double jeopardy clause—establishing a RICO violation would not require proof of a fact in addition to the facts required to prove a section 894 violation. Obviously, the purpose of RICO was not to deal with loan-sharking or gambling activities themselves, since those activities are forbidden by other statutes, but rather to prevent the loan sharks or gamblers from branching out into *other* businesses.<sup>113</sup> In order to avoid double jeopardy problems and to effectuate the congressional purpose,

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110. *United States v. Altese*, 542 F.2d 104, 109 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977). Of course, RICO was designed to prohibit certain activities by "mom and pop," but not their gambling business itself. If, for example, "mom and pop" use their gambling profits to buy into another business that affects interstate commerce, they would violate § 1962(a).

111. The RICO prohibitions apply to a "pattern of racketeering activity" or to a single "collection of an unlawful debt." 18 U.S.C. § 1962 (1976).

112. The interstate commerce requirement would be satisfied by congressional findings, as to 18 U.S.C. §§ 891-894 (1976), that loan-sharking affects interstate commerce. *See Perez v. United States*, 402 U.S. 146, 154-57 (1971).

113. Most of the problems raised above are avoided if the enterprise, though illegal, is a different business from the pattern activities. Thus, to consider a gambler's investment in a loan-sharking operation a violation of § 1962(a) does not do violence to the basic form of the RICO statute. However, it would still be inconsistent with the explicit congressional intent to forbid infiltration of legitimate business. *See* text accompanying notes 20-29 *supra*. The most attractive such arrangement, from a prosecutor's point of view, would be when a Mafia "family" controls a variety of illegal activities, and the affairs of the enterprise are conducted through a pattern of such activities, suggesting a § 1962(c) violation. In that case, the entire illegal enterprise (*i.e.*, the family itself) would be distinct from the particular pattern crimes that might be charged. Thus, no problems of double jeopardy or duplicativeness would be presented. Furthermore, this seems to be the type of organization Congress sought to attack with the RICO statutes. *See* SENATE REPORT, *supra* note 30, at 76-78. Accordingly, in this type of situation, a literal reading of the statutory term enterprise might not be inconsistent with what is, in this particular case, a somewhat ambiguous congressional intent.

the "enterprise" under subsection 1961(4) of RICO must be separate from "the pattern of racketeering activity" or the "collection of an unlawful debt." Thus, the Sixth Circuit is correct in its holding in *Sutton* that the "enterprise" must be something different from the "pattern of racketeering activity," but the courts of appeals in other circuits are correct in their conclusion that the affected enterprise need not be a legitimate or even ostensibly legitimate business.<sup>114</sup>

## 2. Governmental Agency as the "Enterprise"

The second problem raised by the definition of enterprise is whether it may encompass a governmental entity; that is, whether one can be prosecuted under subsection 1962(c) for conducting the affairs of a government office through a pattern of racketeering activity. The definition of enterprise could arguably include a state as a "legal entity," but a consideration of the rest of RICO, as well as the legislative

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114. The problem arising from the tendency of the courts to allow the various elements of a RICO offense to be combined instead of requiring each element to be proven separately is further illustrated by the case in which a corporation is a defendant—a growing trend in the federal enforcement effort. See *United States v. Marubeni America Corp.*, No. Cr 78-1060 (C.D. Cal. May 30, 1979); *United States v. Thevis*, 474 F. Supp. 134, 137-39 (N.D. Ga. 1979). If corporate representatives bribe two Korean officials in connection with the acquisition of a new subsidiary plant in that country, there is an arguable § 1962(b) violation. (This assumes that the bribes of the foreign officials may be found to be violations of the mail fraud statute, 18 U.S.C. § 1341 (1976), under the theory adopted by the court in *United States v. Bush*, 522 F.2d 641, 646-47, 651-53 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) (deprivation to citizens of city of "honest and loyal services of a public official" constitutes fraud within meaning of § 1341).) The corporation is a "person" within the definition of § 1961(3) ("person" includes any individual or entity capable of holding a legal or beneficial interest in property"), and the new subsidiary is the "enterprise" that is being acquired through a pattern of racketeering activity. Subsection 1962(b) prohibits any "person" from acquiring an enterprise that is engaged in interstate or foreign commerce through a pattern of racketeering activities. Accordingly, the corporation as well as the corporate officials may be guilty of a § 1962(b) violation, and the subsidiary may be forfeited under § 1963.

But suppose the corporation bribes the Korean officials in order to ensure that the Korean government will purchase \$10 million worth of the company's product. Initially, this appears to be a § 1962(c) violation, which provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate . . . commerce, to conduct . . . such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c) (1976). The corporation is clearly being operated through a pattern of racketeering activities. However, if the corporation is the defendant, it must be the "person" performing the illegal acts under § 1962(c). But, if the corporation is the "person," then what is the "enterprise"? It is important for the courts to realize that the "enterprise" must not be the same as the corporate defendant and that some separate entity must be involved if a corporation is to be a defendant under RICO.

The necessity of separating the "enterprise" from the defendant, whether the defendant is a gambler or a corporation, is made clear by this example, because if a corporation has operated itself through a pattern of racketeering activities, what is forfeited under § 1963? Nothing less than the entire corporation! While the courts have had no difficulty finding that a gambling business operated through a pattern of gambling activities should be forfeited, they may balk at ordering forfeiture of a General Motors or an Exxon when such a corporate enterprise is operated through a pattern of illegal activities.

history,<sup>115</sup> indicates that such a construction is not an appropriate interpretation.

Section 1962 forbids "any person" from performing the specified acts of acquiring or operating an enterprise through a pattern of racketeering activity.<sup>116</sup> "Person" is defined in subsection 1961(3) as "any individual or entity capable of holding a legal or beneficial interest in property."<sup>117</sup> Assume, as in *United States v. Mandel*,<sup>118</sup> that the person charged is a state governmental official and the enterprise charged is the State of Maryland.<sup>119</sup> Obviously, the official, while capable of holding an interest in property, is not capable of holding any interest in the property in question—the state.<sup>120</sup> More importantly, it is obvious that the individual cannot invest in the state in violation of subsection 1962(a) or acquire any interest in the state in violation of subsection 1962(b). Nor, by the same token, can the individual forfeit any personal interest in the state under sections 1963 and 1964.<sup>121</sup> The only possible application of RICO is to allege that the individual "conducted the affairs of the State "through a pattern of racketeering activity or collection of an unlawful debt" in violation of subsection 1962(c).<sup>122</sup>

The court in *Mandel* rejected this argument, noting that the general thrust of RICO, as discussed above, was aimed at infiltration of legitimate businesses and the divestiture of interests in such businesses.<sup>123</sup>

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115. The Senate Report expressed a desire to prevent infiltration of "legitimate organizations," which might be thought to include governmental agencies. However, when the Report spelled out what was meant by "legitimate organizations," it spoke about commercial life and anticompetitive effects in such a way as to indicate that private business was being referred to. SENATE REPORT, *supra* note 30, at 76-77. The only mention of the problem of corruption of governmental agencies occurred in reference to title VIII, where Congress noted that gambling profits are frequently used to corrupt government officials. *Id.* at 74-75.

116. 18 U.S.C. § 1962 (1976).

117. *Id.* § 1961(3).

118. 415 F. Supp. 997 (D. Md. 1976), *aff'd and remanded on rehearing*, 602 F.2d 653 (4th Cir. 1979), *discussed at* notes 123-24, 279-84 *infra* and accompanying text.

119. Mandel, the Governor of Maryland, was charged with accepting bribes in exchange for promoting favorable legislation for certain race tracks in the state. *Id.* at 1003-04.

120. While this section might refer only to a general capability to hold property, that was apparently not the intent of Congress. The section analysis states: "Subsection (4) defines 'enterprise' to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by an individual or group capable of holding a property interest can be reached." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 56 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4032; *see* SENATE REPORT, *supra* note 30, at 158. While the Report does not specifically say "capable of holding a property interest in that group," that seems to be the congressional intent.

121. Section 1964 provides for civil remedies to seek recovery for injuries caused by the defendants' violation of section 1962. 18 U.S.C. § 1964 (1976).

122. *Id.* § 1962(b).

123. 415 F. Supp. at 1020. Indeed it is quite clear that, even if Congress had intended to do so, they could not, as a constitutional matter, have provided that duly elected or appointed state officials must forfeit their office as a result of a state law violation. *See Kentucky v. Dennison*, 65 U.S. (24 How.) 107-08 (1860); notes 20-24, 34-38 *infra* and accompanying text.



The court concluded:

The interpretation of this statute to include "states" within the meaning of "enterprise" would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships. Unless Congress has clearly indicated its intentions to "alter sensitive federal-state relationships," courts should be reluctant to give ambiguous phrases within a statute that effect.<sup>124</sup>

Notwithstanding the seemingly limited intent of Congress, several other courts have held that governmental agencies are included in the definition of enterprise. In *United States v. Frumento*<sup>125</sup> the Court of Appeals for the Third Circuit found that the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes was an acceptable enterprise. While the court could not point to specific language in the legislative history to support this interpretation of the unclear statutory language, it refused to believe that

Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in our nation's economic life, Congress intended to ignore an important aspect of the economy because it was state controlled and operated? We think not.<sup>126</sup>

In fact, Congress was well aware of the problem of corruption of governmental officials and dealt with it in separate sections of the Act.<sup>127</sup> The fact that this problem is not mentioned as one that RICO

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124. 415 F. Supp. at 1021. The court cited *Rewis v. United States*, 401 U.S. 808 (1971). *Rewis* interpreted the federal Travel Act, 18 U.S.C. § 1952 (1976), which forbids interstate travel with intent to "promote, manage, establish, carry on, or facilitate the promotion" of gambling operations. In *Rewis* petitioners operated a Florida lottery that attracted bettors from Georgia. 401 U.S. at 810. The question was whether the petitioners aided and abetted the travel of the gamblers that they invited. *See id.* at 808 & n.1. While it could certainly have been argued, based on the statutory language, that petitioners aided and abetted such interstate travel by providing its goal, the Supreme Court rejected that argument. *Id.* at 811. They held that "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships" and concluded that Congress' failure to indicate any such intent in the legislative history "suggest[ed]" that Congress did not intend such a broad interpretation. *Id.* at 812. Obviously, federal prosecution of state officials would have a far greater impact on "sensitive federal-state relationships" than the prosecution in *Rewis*.

125. 563 F.2d 1083 (3d Cir. 1977); *see* notes 205-71 *infra* and accompanying text (discussing § 1962(d)).

126. 563 F.2d at 1091. The court seized on the congressional statement that the provisions of title IX were to be "liberally construed to effectuate [their] remedial purposes" to justify its holding. *Id.* To the extent that RICO is a criminal statute, this statement is contrary to the often repeated admonition of the Supreme Court that criminal statutes are to be construed *strictly*. *E.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971). Presumably, therefore, the congressional statement is only applicable to the remedial civil portions of the statute and not to the punitive criminal provisions. Accordingly, it has no application to this discussion.

127. 18 U.S.C. §§ 1505, 1511 (1976); *see* SENATE REPORT, *supra* note 30, at 71-74; note 115 *supra*.

sought to solve seems to indicate strongly that such was not Congress' intent.

In *United States v. Brown*<sup>128</sup> the enterprise was the Macon, Georgia, police department. The defendant police officers were found to have conducted the affairs of the police department through a pattern of bribe acceptance in violation of subsection 1962(c).<sup>129</sup> The Court of Appeals for the Fifth Circuit in *Brown* relied on the general purposes of the Organized Crime Control Act of 1970 as a whole in finding that Congress intended to include governmental agencies in the coverage of RICO, but did not consider the possibility that those purposes could have been effectuated by one of the other nine titles of the Act.<sup>130</sup>

In summary, a careful consideration of the entire language of RICO as well as its legislative history leaves the issue somewhat unclear. However, the better solution seems to be that of the United States Supreme Court in *United States v. Rewis*.<sup>131</sup> In the presence of somewhat vague statutory language and in the absence of any clear statement of congressional intent, the safest course, and the course suggested by the rule of lenity,<sup>132</sup> is to conclude that had Congress intended to include state governmental offices within the ambit of RICO, it would have somewhere indicated that intention explicitly.

### C. Subsection 1961(5): Pattern of Racketeering Activity

Subsection 1961(5) provides that the

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the Commission of a prior act of racketeering activity.

In the original bill, S. 1861, only a single act of racketeering activity was required to form a pattern.<sup>133</sup> The Justice Department suggested that this definition did not seem consistent with the use of the term pattern and recommended that the subsection be changed to its present form.<sup>134</sup>

128. 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

129. *Id.* at 412. The defendants were also convicted of a violation of § 1962(d) for conspiring to violate § 1962(c). See notes 205-71 *infra* and accompanying text (discussing § 1962(d)).

130. 555 F.2d at 415-16. See also *United States v. Ohlson*, 552 F.2d 1347, 1350 n.3 (9th Cir. 1977) (San Francisco police department "enterprise" in RICO conviction). In *United States v. Barber*, 476 F. Supp. 182 (S.D.W. Va. 1979), both the enterprise and the defendant were the Alcoholic Beverage Control Commissioner of West Virginia. *Id.* at 184. The court concluded that state agencies were included in the definition of enterprise. *Id.* In *United States v. Sisk*, 476 F. Supp. 1061 (M.D. Tenn. 1979), the court reached the same conclusion when the Governor's office of the State of Tennessee was the enterprise. *Id.* at 1062.

131. 401 U.S. 808 (1971), *discussed at* note 124 *supra*.

132. *Id.* at 812.

133. 115 CONG. REC. 9512 (1969).

134. SENATE REPORT, *supra* note 30, at 122. This subsection could be read as not

As previously discussed,<sup>135</sup> this subsection apparently was written to eliminate any statute of limitations restrictions concerning the pattern offenses, requiring only that one offense occur after the date of the enactment of RICO<sup>136</sup> and that the two offenses occur within ten years of each other. There is no requirement that the pattern of offenses must have any proximity to the RICO indictment.<sup>137</sup>

The interpretation of the meaning of the term pattern is another area of RICO on which the circuits are divided.<sup>138</sup> The issue is whether the term pattern means that there must really be a pattern in the usual sense of the word or whether any two acts of racketeering activity, however unrelated, will suffice. A second, somewhat contradictory issue, is whether the acts may be part of one scheme, such as two mailings in a mail fraud scheme, or whether they must represent independent examples of wrongdoing.

### 1. *Must the Pattern Crimes be Related?*

The applicable provision in RICO is, once again, not completely

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actually defining pattern, but merely setting forth the minimum requirements for a pattern to be present. *See* United States v. Ladner, 429 F. Supp. 1231, 1243-44 (E.D.N.Y. 1977).

135. *See* text accompanying note 69 *supra*.

136. This was designed to avoid ex post facto challenges under U.S. CONST. art. I, § 9, cl. 3. SENATE REPORT, *supra* note 30, at 158. The courts of appeals have uniformly rejected any ex post facto claims. *See, e.g.,* United States v. Brown, 381 U.S. 437, 456-60 (1965); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975). Since the RICO violation requires an additional wrongful act after the effective date of the statute (October 15, 1970), it seems that the ex post facto claim is not well founded. *See* Marks v. United States, 430 U.S. 188, 192 (1977).

137. *See* SENATE REPORT, *supra* note 30, at 158. There is no speedy trial bar to such an indefinite delay between the commission of the offense and the indictment. United States v. Marion, 404 U.S. 307, 313 (1971). Because RICO requires independent acts beyond the pattern offenses, the statute of limitations does not begin to run until all the elements of the RICO offense have been completed.

However, as the Court recognized in *Marion*, there is a due process consideration in cases of pretrial delay. 404 U.S. at 324. If the pattern offenses occurred so long before the RICO indictment that a defendant could show "substantial prejudice to [his] right to a fair trial and that the delay was an intentional device to gain tactical advantage over" him, the charges must be dismissed. *Id.* an interesting question would arise if the last pattern offense had taken place 20 years before the RICO indictment, but the government had acted as expeditiously as possible to indict the defendant once he or she had taken the final step of the RICO violation. If the defendant had not previously been convicted of the pattern offenses, he or she would have a strong argument that the RICO charge should be dismissed as unduly prejudicial, despite the government's good faith, because of the defendant's patent inability to disprove the allegations of 20-year-old crimes. The defendant's argument might be strengthened by the fact that the government arguably need not prove beyond a reasonable doubt that he or she committed the crimes, but merely that there was probable cause, at the time of the offenses, to believe that the defendant committed them, *i.e.*, that they were "indictable" at the time they were committed.

138. The Seventh Circuit has adopted a narrower interpretation of the statute than the Fifth Circuit, and various district courts have decided the issue both ways. *Compare* United States v. Weatherspoon, 581 F.2d 595, 601 n.2 (7th Cir. 1978) and United States v. Kaye, 556 F.2d 855, 860 (7th Cir. 1977) with United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) and cases cited therein.

clear. The term pattern itself seems to imply some relationship between the acts. However, the definition—"at least two acts of racketeering activity," where "racketeering activity" is "*any* act" (in violation of the enumerated laws)—would seem to require no more than any two such acts, even if totally unrelated.<sup>139</sup>

Notwithstanding the implication in the definition, the legislative history is quite definite in expressing Congress' belief that the acts must be related. Senator McClellan, the sponsor of the bill, cited a criticism raised by the American Civil Liberties Union that "a person could be subjected to the sanctions of title IX [RICO] for committing two widely separated and isolated criminal offenses."<sup>140</sup> Senator McClellan dismissed this criticism as "inaccurate and prejudicial."<sup>141</sup> He quoted the Senate Report:

The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.<sup>142</sup>

Senator McClellan concluded: "So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ."<sup>143</sup>

Despite this seemingly clear-cut pronouncement, a majority of the courts to consider the issue have concluded that "the two or more predicate crimes must be related to the affairs of the enterprise, but need not otherwise be related to each other."<sup>144</sup> In many cases this distinction will be of no importance. If the enterprise is a discrete operation such as a trucking business, two acts of racketeering in furtherance of such business are likely to be related to each other as well.<sup>145</sup> But, in a

139. See note 144 *infra*.

140. 116 CONG. REC. 18940 (1970) (remarks of Sen. McClellan).

141. *Id.*

142. *Id.* (quoting SENATE REPORT, *supra* note 30, at 158).

143. 116 CONG. REC. at 18940.

144. *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Similarly in *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978), the court held:

There [is] no requirement that the two acts be related to each other . . . .

The statute simply require[s] that the person commit at least two acts of racketeering activity within a ten year period. . . .

[H]ad [Congress] wanted to provide for any "relatedness" [it could have done so] . . . . [T]he term "pattern," when used in this context, applies to the relationship of the acts to the enterprise, and no more.

*Id.* at 782; *accord*, *United States v. Moeller*, 402 F. Supp. 49, 58-59 & n.7 (D. Conn. 1975) (interpreting *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) as tacitly supporting this view). See also *United States v. Field*, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977). *Contra*, *United States v. Weatherspoon*, 581 F.2d 595, 601 (7th Cir. 1978); *United States v. Kaye*, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973); *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974).

145. See *United States v. Campanale*, 518 F.2d 352, 355 (9th Cir. 1975).

case such as *United States v. Elliott*<sup>146</sup> where the enterprise is amorphous—comprised of nothing more than a series of essentially unconnected illegal acts<sup>147</sup>—the requirement of “relationship to the affairs of the enterprise” is largely meaningless and does not establish a pattern in any comprehensible sense. If the term pattern is to have any meaning, it should have some greater content than mere relationship to this type of enterprise.

Even where the enterprise is a discrete operation, legal or illegal, complications can arise. Suppose the defendant is an “enforcer” who collects debts for a gambling operation. Since everything he does in connection with his employment is illegal, at least insofar as it furthers a conspiracy, merely showing illegality and the connection to the gambling business is not enough to establish the necessary “continuity plus relationship,” which is what Congress indicated that the term pattern meant. If on one occasion the enforcer collects a debt from a “client” and a year later beats up another client who is unable to pay, this is not a pattern of activity, even though both acts relate to the gambling business. It is “sporadic” activity of the sort that, according to the Senate Report, was not covered by RICO.<sup>148</sup>

On the other hand, if the enterprise is a business being appropriated by racketeers in violation of subsection 1962(b), it is much easier to see the pattern that the Senate was referring to. Threatening one person and beating up another person a year later in connection with an attempt to take over a particular business does suggest a pattern, even though the acts are not closely related in type or time. “Continuity plus relationship” is established by the fact that the two acts lead to a common goal that RICO was specifically designed to prohibit—the takeover of a business.

In fact, the government itself has taken the position that the term pattern must have greater content than simply the commission of any two of the listed crimes. In *United States v. Stofsky*<sup>149</sup> the government proposed, and the court adopted, the following test to establish a subsection 1962(c) violation:

- a. that the defendant committed two or more of the underlying criminal offenses.
- b. that those offenses were committed in the course of his employment by the enterprise in question.
- c. that those offenses were connected with each other by some common scheme, plan or motive so as to constitute a

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146. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), *discussed at* notes 217-31 *infra* and accompanying text.

147. The court in *Elliott* described the so-called enterprise as “amoeba-like.” *Id.* 897-98.

148. See SENATE REPORT, *supra* note 30, at 158.

149. 409 F. Supp. 609 (S.D.N.Y. 1973).

pattern and not simply a series of disconnected acts.<sup>150</sup>

Similarly, in *United States v. Kaye*<sup>151</sup> the Court of Appeals for the Seventh Circuit held that the government must prove "interrelatedness beyond a reasonable doubt."<sup>152</sup> While this view is not clearly mandated by the words of the statute, it seems a sensible approach that is consistent with the congressional intent.

## 2. Pattern Crimes as Part of a Single Scheme

The second issue is whether the pattern of racketeering activity may be satisfied by two acts that are part of the same scheme, such as two mailings in a mail fraud scheme. The Court of Appeals for the Seventh Circuit recently confronted this issue in *United States v. Weatherspoon*.<sup>153</sup> In that case, the defendant was charged with defrauding the Veterans Administration by providing false information on the number of veterans attending her beauty college. She was indicted for several counts of mail fraud in violation of 18 U.S.C. § 1341, as well as for operating her business through a pattern of mail fraud in violation of subsection 1962(c).<sup>154</sup>

The defendant contended that the pattern of racketeering activity required two discrete crimes and not just two acts that were part of a single scheme.<sup>155</sup> The Seventh Circuit simply pointed to the definition: pattern requires two "acts indictable under federal law."<sup>156</sup> Since each mailing is a separate indictable act, it follows that two such mailings satisfy the definition of a pattern, at least where, as here, they are related to each other.<sup>157</sup>

150. *Id.* at 613. The court in *Stofsky* noted that in title X of the Organized Crime Control Act (18 U.S.C. § 3575 (1976)), which involves higher penalties for dangerous special offenders, a "pattern of criminal conduct" is found if the conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 614. The court read the term "pattern" narrowly because of a fear that a broad reading would render the statute unconstitutionally vague under the Supreme Court's holding in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). 409 F. Supp. at 614.

151. 556 F.2d 855 (7th Cir. 1977).

152. *Id.* at 860 (relying on *United States v. White*, 386 F. Supp. 882 (E.D. Wis. 1974)).

153. 581 F.2d 595 (7th Cir. 1978).

154. *Id.* at 599. She was also indicted for several counts of making a false statement in violation of 18 U.S.C. § 1001 (1976). 581 F.2d at 599. Since § 1001 is not one of the "pattern" violations listed in § 1961, those counts are not relevant here.

155. 581 F.2d at 601.

156. *Id.* at 601-02.

157. *Id.* at 602. *But see* *United States v. Moeller*, 402 F. Supp. 49, 59 (D. Conn. 1975). In *Moeller* the defendants kidnapped three employees of a factory and then burned it down. *Id.* at 57. The court apparently agreed with the defendants' argument that this did not constitute a pattern as Congress intended the term:

Were the question open, I would have seriously doubted whether the word "pattern" as used in § 1962(c) should be construed to mean two acts occurring at the same place on the same day in the course of the same criminal episode.

In view of the fact that the language of the statute is quite clear, and that the Senate Report's requirement of continuity does not preclude two criminal acts that occurred on the same day as part of the same scheme, the approach of the Seventh Circuit seems correct on this issue, although it is doubtful that Congress ever contemplated that Arnetta's Beauty College would be caught in RICO's net, given the congressional purpose to combat "organized crime." Indeed, virtually every mail fraud case will now be a RICO violation as well, since mail fraud usually involves more than one mailing and most mail frauds involve a purportedly legitimate business that exists independently of the fraudulent mailings. Yet, such a series of indictable acts—all part of a single criminal scheme—will, in other cases, constitute exactly the sort of situation that Congress sought to embrace with RICO. For example, the disabling of a series of trucks on the same night in a successful effort to take over a trucking business would clearly constitute a subsection 1962(b) violation. Because Congress would have found it extremely difficult to construct the statute to exclude the former cases and include the latter, the matter is perhaps best left to prosecutorial discretion, as Congress has apparently done.

#### D. Subsection 1961(6): Unlawful Debt

An "unlawful debt" is defined as a debt:

- (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, *and*
- (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money [at usurious rates].

The unlawful debt provision substitutes for the pattern of racketeering activity as a predicate to a violation of subsections 1962(a), (b), or (c). Thus, to violate subsection 1962(c), for example, one must operate an enterprise through a pattern of racketeering activity *or* through collection of a single unlawful debt. The Senate Report states that section

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While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word "pattern" implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity.

*Id.* at 57 (emphasis original). The court then quoted the portion of the Senate Report (that was also quoted by Senator McClellan, *see* text accompanying notes 141-43 *supra*), emphasizing the term "continuity." However, the court ruled against the defendant because the issue had already been decided by the Second Circuit in *United States v. Parness*, 503 F.2d 430, 441-42 (1974), *cert. denied*, 419 U.S. 1105 (1975). 402 F. Supp. at 57.

1961(6), "in effect, includes loan sharking as a racketeering activity in connection with acquisition or conduct of a legitimate organization."<sup>158</sup> Because "extortionate credit transactions"<sup>159</sup> were already included within the definitions of racketeering activity in subsection 1961(1), it is not apparent, nor is it anywhere explained, why this subsection was needed.

In the original bill, S. 1861, collection of an unlawful debt was only mentioned in subsection (b), which related to the acquisition of a legitimate business.<sup>160</sup> Because pattern of racketeering activity was defined in S. 1861 as a single act of racketeering activity,<sup>161</sup> the inclusion of the "collection" language served no other purpose than to make it clear that loan sharking under state as well as federal law was included under subsection 1962(b),<sup>162</sup> although this could have been better accomplished by simply including loan sharking in the list of state offenses covered in the subsection 1961(1)(A) definition of racketeering activity.

When "pattern of racketeering activity" was redefined to require two acts, the "collection" language, which now appeared in all three of the substantive subsections,<sup>163</sup> became significant. For no stated or readily apparent reason,<sup>164</sup> the redefinition subjected loan sharks and others who collected illegal gambling debts to the sanctions of RICO on proof of a *single* violation, rather than proof of two violations as required for other racketeers. Whatever Congress' reasons, it is obviously advantageous to the government to use this subsection whenever possible, since only one predicate offense must be shown instead of two. An examination of one case in which this subsection was used illustrates the problems that can arise.

In *United States v. Salinas*<sup>165</sup> the government indicted two defendants for a violation of subsection 1962(c), charging them with operating a gambling enterprise through collections of unlawful gambling debts.<sup>166</sup> The district court dismissed the indictment based on the defendant's

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158. SENATE REPORT, *supra* note 30, at 158.

159. Extortionate credit transactions violate 18 U.S.C. §§ 891-894 (1976), the federal loan-sharking statutes. *See Perez v. United States*, 402 U.S. 146, 154-57 (1971).

160. *See* note 28 *supra*.

161. *See* text accompanying notes 44-47 *supra*.

162. Read in their entirety, 18 U.S.C. §§ 892-894 (1976) seem to prohibit the same activities included in the "unlawful debt" language of RICO.

163. There was no congressional explanation of these changes. The SENATE REPORT, *supra* note 30, at 22-23, reflects these changes, which occurred at the time that S. 1861 became title IX of S. 30.

164. There is no reason to believe that Congress considered loan sharking more onerous than murder, extortion, or the other pattern offenses. Loan sharking implies a certain amount of organization and continuity that would thus render the showing of a pattern unnecessary, but also contains these characteristics.

165. 564 F.2d 688 (5th Cir. 1977).

166. *Id.* at 689. This case again illustrates the difficulty with allowing the enterprise to be an illegal enterprise defined in terms of the pattern activities. It is impossible to conduct an illegal gambling enterprise other than through collection of unlawful gambling debts, thus rendering the RICO provisions a meaningless tautology.



argument that the definition of unlawful debt, as it pertained to this case, required both that the debt be incurred in gambling activity in violation of Texas law *and* incurred in connection with the *business of gambling* in violation of state law.<sup>167</sup> Because the business of gambling was not prohibited as such by Texas law, it followed, ipso facto, that the definition of unlawful debt could not be met.<sup>168</sup>

The Court of Appeals for the Fifth Circuit made short work of this claim, stating that "we must look not to 'the manner in which states classify their criminal prohibitions, but whether the particular state involved prohibits the . . . activity charged.'" <sup>169</sup> Because "gambling" was illegal in Texas, the court concluded that it was not necessary that Texas have any law specifically prohibiting the business of gambling for the purposes of satisfying the definition in subsection 1961(6).

While this resolution seems sensible, it has the effect of reading the business of gambling provision out of the definition of unlawful debt. Since this provision in subsection 1961(6)(B) is connected to subsection 1961(6)(A) ("gambling activity") by the conjunctive "and," such a reading seems to defy the clear wording of the statute. On the other hand, to require the government to prove that a debt was "incurred . . . in gambling activity" *and* "incurred in connection with the business of gambling" (whatever those two phrases may mean) is a meaningless requirement that does not advance any of the purposes of RICO. Accordingly, the approach of the Fifth Circuit in *Salinas* seems to make the best of a poorly drafted statute.<sup>170</sup>

### III. SECTION 1962:<sup>171</sup> PROHIBITED ACTIVITIES

#### A. Subsection 1962(a): Investment of Racketeering Funds

The most serious problem presented by subsection 1962(a), the question of when the pattern crimes must have been committed in rela-

167. *Id.*; see 18 U.S.C. § 1961(6) (1976).

168. 564 F.2d at 689.

169. *Id.* at 691 (quoting *United States v. Nardello*, 393 U.S. 286, 295 (1969) (involving Travel Act, 18 U.S.C. § 1952 (1964))).

170. S. 1861, 91st Cong., 1st Sess. (1970), defined "unlawful debt" as [A] debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate. *Id.* § 1961(7). In this definition the use of the conjunctive made more sense since parts A and B are not duplicative. It says, in effect, that an unlawful debt is incurred in the business of gambling *and* unenforceable under state gambling laws. However, this section was changed to require that the business of gambling be in violation of state law, because the collection of a debt incurred in the business of gambling in Nevada would have violated RICO, because it is unenforceable under state law. See note 32 *supra*.

When Congress changed the subsection to add "in violation of the law" to both parts (A) and (B), they apparently overlooked the fact that a debt incurred in gambling "in violation of the law" of a state would automatically be unenforceable, thus rendering part B unnecessary.

171. The text of § 1962 provides:

tion to the RICO indictment, has already been discussed.<sup>172</sup> Two additional problems are examined in this part.

### 1. *Participation as a Principal*

Subsection 1962(a) prohibits the investment in an enterprise engaged in interstate commerce of income received, directly or indirectly, "from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal."<sup>173</sup> The question that arises is whether "in which such person has participated as a principal" applies only to the "collection of an unlawful debt" or whether it also modifies "pattern of racketeering activity." This question is important because if the "principal" language applies only to the collection of an unlawful debt, subsection 1962(a) could be held to prohibit the investment of *any* monies received from a pattern of racketeering activity, even if the recipient had not personally participated in the racketeering. For instance, a banker or stockbroker who invests funds entrusted to him or her by a racketeer would arguably be subject to prosecution under subsection 1962(a).

Although the face of the statute is ambiguous, the legislative history is relatively clear and indicates that subsection 1962(a) is limited to

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#### § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in the law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1976).

172. See text accompanying notes 133-57 *supra*.

173. For the full text of § 1962(a), see note 171 *supra*. Compare 18 U.S.C. § 1962(a) (1976) (current version) with S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9512 (1969) ("collection" language not included; was added to current version without explanation).

investments by individuals who have participated as principals in racketeering activity. Deputy Attorney General Richard Kleindienst stated the Justice Department's position on an earlier version<sup>174</sup> of subsection 1962(a):

It is felt that the provisions . . . are so indefinite as to intent as to raise serious constitutional problems. Under the language of the subsection as presently drawn, it is not clear whether the prohibition is aimed primarily at the person who is an active participant in illegal enterprises or at the person who does business with such a participant, or both. If the provision is intended to reach the person who knowingly receives income derived directly or indirectly from a pattern of racketeering activity in which he did not participate, there are problems not only of vagueness of definition but also of proof.<sup>175</sup>

Accordingly, the Justice Department recommended adding the phrase "in which such person has participated as a principal" after "pattern of racketeering activity"<sup>176</sup> to clarify that only racketeering principals were to be covered by subsection 1962(a). In its final form the bill added the "collection of an unlawful debt" language between these two phrases, but obviously this was not intended to change the modification recommended by the Justice Department; thus, it is clear that subsection 1962(a) applies only to racketeering principals.

## 2. Due Process Consideration

Syntactical difficulties aside, subsection 1962(a) poses a serious due process problem. The statute does not prohibit any inherently wrongful conduct; it simply forbids the investment of certain monies in enterprises engaged in interstate commerce. Obtaining money in violation of other statutes does not make its subsequent investment any more wrongful. In fact, the source of the monies is not related to the harm envisioned by Congress. A racketeer who purchased a business with money obtained from a relative's estate would pose exactly the same threat of harm as one who used loan-sharking monies.<sup>177</sup>

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174. Kleindienst was commenting on S. 1861. See SENATE REPORT, *supra* note 30, at 121.

175. *Id.* at 122.

176. *Id.* at 123. The Justice Department further recommended that the exception concerning purchase of securities on the open market be added. *Id.* Both of these suggested changes were adopted. *Id.* at 23. The term "knowingly" also has been omitted from the final version of § 1962(a). This was presumably done, not to eliminate the element of *scienter*, but simply because it was felt that anyone who had participated as a principal in the racketeering activity would automatically "know" where the money came from. Because this is a *malum prohibitum* offense, if a case arises in which this becomes an issue, the term "knowingly" should be read back into the statute pursuant to the dictates of the Supreme Court in *Morrisette v. United States*, 342 U.S. 246, 250-63 (1952). See also *Scales v. United States*, 367 U.S. 203, 223-26 (1961).

177. The harm which § 1962 is designed to prevent was summed up in the Senate Report:

Subsection 1962(a) can, by reference to the terms “directly or indirectly,” be construed to cover investment of money from legitimate sources. Suppose a loan shark received \$30,000 a year from loan sharking and \$15,000 a year from a legally operated florist shop.<sup>178</sup> The loan shark scrupulously uses the loan-sharking money to pay rent, buy groceries, and pay taxes, while using the florist shop money to invest in other businesses. Obviously, the loan-sharking money has been used “indirectly” to invest, because if the loan shark had not possessed the illegally procured funds, the florist shop money would have gone to pay bills and would not have been available for investment.

Because Congress was concerned not with the source of the funds, but with the identity of the investor—Congress wanted to keep “racketeers” out of legitimate businesses regardless of whether their money had come directly from racketeering or had been laundered—and because “indirectly” seems to have no other meaning, this result is probably exactly what Congress intended. In *United States v. Parness*<sup>179</sup> the Court of Appeals for the Second Circuit held that whenever receipt of funds from racketeering plus investment in an enterprise is shown, an “indirect” violation of section 1962 is proved without the necessity of showing that the particular funds invested came directly from racketeering.<sup>180</sup> Indeed, it would normally be impossible for the government to prove exact identity of funds used. (Nevertheless, in a case in which money was channeled directly from a legitimate source such as a relative’s estate in to an investment in a legitimate business, the government would not be able to establish even an indirect investment of racketeering funds and the prosecution must fail by the terms of subsection 1962(a).)

It is apparent, therefore, that subsection 1962(a) is largely a crime of status<sup>181</sup> mandating, in effect, that racketeers may not invest their

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When organized crime moves into a business it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority.

SENATE REPORT, *supra* note 30, at 76 (quoting ABA Study).

178. This was the style of Al Capone’s rival Dion O’Banion whose flower arrangements graced gangland funerals in Chicago for many years.

179. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Parness* the defendant embezzled funds from a Caribbean gambling casino. He later made loans to the casino, allegedly with the embezzled funds and then foreclosed on the loan (thus acquiring an enterprise through a pattern of racketeering activity in violation of § 1962(b)). *Id.* at 434-36. The court was undeterred by the fact that the government was unable to prove that the embezzled funds were the subject of the loan. *Id.* at 436.

180. *Id.* at 435-38. *Parness* dealt with the “directly or indirectly” language of § 1962(b). *See id.* at 438-40.

181. Section 1962 does not violate the cruel and unusual punishment clause of the eighth amendment, as interpreted in *Robinson v. California*, 370 U.S. 660, 667 (1962), because no “disease” or uncontrollable behavior is involved and also because it does require some conduct, albeit legitimate conduct, beyond merely being a racketeer. *See Powell v. Texas*, 392 U.S. 514, 532-35 (1968). *But see Lanzetta v. New Jersey*, 306 U.S. 451, 457-58 (1939).

money in enterprises engaged in interstate commerce. Racketeers are prevented from "going straight" if they desire to give up the life of crime and buy in to a legitimate business even if, as discussed, the funds to be used were acquired from a legally operated business. This prohibition impinges on a liberty/property interest protected by the due process clauses of the fifth and fourteenth amendments.<sup>182</sup> But this observation does not end the inquiry. Given that a liberty interest is abridged by subsection 1962(a), the question becomes whether the abridgement is permissible.<sup>183</sup> Can racketeers be prevented from doing what everyone else is entitled to do?

A racketeer is not in the same position as a convicted felon, who can be deprived of such a fundamental aspect of liberty as the right to vote.<sup>184</sup> Under RICO, defendants need merely be indictable for certain crimes to be prevented from investing their money—they need not have been convicted.<sup>185</sup> Still, if there is a rational basis for the prohibition and a "real and substantial relation to the object sought to be attained,"<sup>186</sup> the prohibition is appropriate.<sup>187</sup> Certainly Congress' fear of the harm

182. *Meyer v. Nebraska*, 262 U.S. 390 (1923), defined "liberty" to include the right "to engage in any of the common occupations of life." *Id.* at 399. See also *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972), and cases cited therein. Presumably this liberty interest would apply whether the funds were legally or illegally obtained.

183. "[T]he fact that a liberty interest cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) (citation omitted). See also *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978):

"[T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

*Id.* at 107 (quoting *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 536-37 (1949)).

On the other hand, the law may not be "unreasonable, arbitrary or capricious, and the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). When a statute goes beyond mere economic regulations and imposes criminal penalties for the exercise of a protected right, the relationship between state interest and the means described in *Nebbia* must, of course, be even stronger. Cf. G. GUNTHER, *CONSTITUTIONAL LAW* 584 (9th ed. 1975) (substantial restraints on state action in regulation of matters other than commercial transactions).

184. *Richardson v. Ramirez*, 418 U.S. 24, 42 (1974). *Richardson* involved an equal protection claim, which is also applicable here, and was decided on the basis of § 2 of the fourteenth amendment which, the court held, specifically excepted those who had participated in crimes from the right to vote. *Id.* at 42, 54.

185. Under the view of the statute taken in this Article, a racketeer may not be prosecuted under this subsection of RICO if he or she has been acquitted of the pattern offenses. See notes 66-71 *supra* and accompanying text. Note, however, that RICO requires both the investor and the funds themselves (at least "indirectly") to be "dirty," which weakens the racketeer's due process/equal protection claim. See notes 172-76 *supra* and accompanying text. Congress may more easily justify prohibiting racketeers from investing funds obtained from criminal activities than "all funds," even though, as noted, the evil which Congress seeks to stamp out would be equally present in any investment by racketeers.

186. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

187. The prohibition is appropriate as long as the legislative enactment does not impinge on fundamental rights, such as the freedom of speech and association. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

caused by racketeers entering legitimate businesses is realistic and is reflected in specific congressional findings.<sup>188</sup> Conversely, there is not a perfect congruence between the harm sought to be prevented—infiltration of legitimate business—and the measure adopted to prevent this harm—prohibiting the investment of “dirty” money. As noted, a racketeer still can infiltrate legitimate businesses by using “clean” money from a relative’s estate.<sup>189</sup>

Although there is not a perfect relationship, a real and substantial relationship exists between the disease and the cure.<sup>190</sup> Most of the money available to racketeers for investment will have come, directly or indirectly, from their racketeering activities. Accordingly, RICO will prevent racketeers in most cases from investing in, and hence from gaining a degree of control over, legitimate businesses. RICO, therefore, seems to comport with the requirements of due process.

*B. Subsections 1962(b)-(c): Acquisition and Operation of an Enterprise Through Racketeering*

Subsections 1962(b) and (c) provide:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.<sup>191</sup>

Subsection 1962(b) does not pose the same constitutional problem as subsection 1962(a) because it does not penalize a racketeer simply for being a racketeer. If the racketeer uses extortion, bribery, or other illegal methods (constituting a pattern of racketeering activity) to acquire a business, the racketeer has performed, in addition to the extortion or bribery, an additional act that affects interstate commerce and that Congress has a legitimate interest in preventing. Unlike the prohibition of subsection 1962(a), subsection 1962(b) does not disadvantage the

188. *E.g.*, SENATE REPORT, *supra* note 30, at 1-2, 76-78.

189. Furthermore, a nonracketeer can knowingly invest “dirty” money and not be subject to RICO because he or she did not “participate as a principal” in the racketeering. See notes 173-76 *supra* and accompanying text.

190. For the relationship to be perfect, it would have been necessary for Congress to have banned all racketeers from participation in interstate commerce, regardless of the source of the funds. This would be an even greater impingement on individual liberties, so it would be foolish to require it to attain a statutory form that is purported to further those liberties.

191. 18 U.S.C. § 1962(b)-(c) (1976).

racketeer vis-à-vis the normal citizen—*nobody* is entitled to take over a business by unlawful means.<sup>192</sup> Similarly, as to subsection 1962(c), no one is entitled to conduct the affairs of an enterprise by threatening to beat up potential customers if they do not avail themselves of proffered goods or services.

The only special problem posed in subsections 1962(b) and (c) is the meaning of the word "through." In *United States v. Nerone*<sup>193</sup> the Court of Appeals for the Seventh Circuit reversed a conviction under subsection 1962(c) because the government failed to establish that a trailer park, which served as a front for an illegal gambling operation, was operated "through" a pattern of racketeering activity.<sup>194</sup> The court held that the word "through" meant "by means of"<sup>195</sup> and found that, although the gambling operation was run by means of the trailer park front, the government had not shown, as it should have, that the reverse was true—that the trailer park was run by means of a pattern of gambling activities. The court implied that proof "that gambling revenues were used by or in any way channeled in to" the trailer park would satisfy this requirement.<sup>196</sup>

Thus, the court held that if a legitimate business is used as a front for racketeering activity and the racketeering money constitutes part of the working capital of the front operation, this is enough to conclude that the legitimate business was operated "through" the illegitimate business. This approach seems sensible.

In *United States v. Stofsky*<sup>197</sup> the defendant union officials had accepted payments from certain union-shop manufacturers in return for "looking the other way" when the manufacturers used nonunion personnel. The defendants were charged with a violation of subsection 1962(c) for operating the union through a pattern of violations of the Hobbs Act<sup>198</sup> and the Taft-Hartley Act.<sup>199</sup> The defendants contended that RICO was unconstitutionally vague in that it failed "to set forth the degree and intensity of the relationship required between the racketeering activity and the usual operation of the enterprise";<sup>200</sup> that is, it failed to define whether "through" meant that the alleged racketeering activity

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192. Or, to take an example applicable to § 1962(c), no one is entitled to operate a business by threatening to murder customers if they do not avail themselves of his or her wares or services.

193. 563 F.2d 836 (7th Cir. 1977).

194. The court criticized the government for not using the gambling operation itself, instead of the trailer park, as the enterprise. *Id.* at 839 n.3, 852. Perhaps the government recognized the problems posed by use of the illegal operation as the enterprise, although the appellants believed it was because the government wanted to secure a forfeiture of the trailer park's property. *Id.* at 851.

195. *Id.* at 851 (relying on BLACK'S LAW DICTIONARY 1652 (rev. 4th ed. 1968)).

196. *Id.*

197. 409 F. Supp. 609 (S.D.N.Y. 1973).

198. 18 U.S.C. § 1951 (1976).

199. 29 U.S.C. § 186(b) (1976).

200. 409 F. Supp. at 612.

must be "in furtherance of the enterprise," or if it need be merely not harmful to the enterprise, or whether it "must be a vital and constant part of the enterprise."<sup>201</sup> The court held that

the statute does not define this connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise, as defendants suggest it must.

In this Court's view, the statute fails to state these requirements because Congress did not intend to require them in these terms. The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be perverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed, be utilized to further otherwise legitimate goals. No good reason suggests itself as to why Congress should want to cover some, but not all of these forms; nor is there any good reason why this Court should construe the statute to do so. It plainly says that it places criminal responsibility on both those who conduct and those who participate, directly or indirectly, in the conduct of the affairs of the enterprise, without regard to what the enterprise was or was not about at the time in question.<sup>202</sup>

The court read "through" as requiring some discernible connection between the racketeering activities and the affairs of the enterprise, but the court did not hold that the enterprise must be advanced by the racketeering.

Thus, the court in *Stofsky* concluded that although the defendants' acts were antithetical to the union, nevertheless the defendants had operated the union "through" their racketeering activities.<sup>203</sup> This

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201. *Id.*

202. *Id.* at 613; *accord*, *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977); *United States v. Ladmer*, 429 F. Supp. 1231, 1244-45 (E.D.N.Y. 1977); *United States v. Scalzitti*, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975).

203. Similarly, in *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), the court, without "attempt[ing] definitive resolution" of the meaning of the term "through" found that a union official who embezzled funds from his union was appropriately convicted of participating in the affairs of the union through a pattern of racketeering activity in violation of § 1962(c). *Id.* at 990. This approach is consistent with the legislative history that specifically cited "theft of union funds" as one of the activities at which RICO was aimed. SENATE REPORT, *supra* note 30, at 78. In *United States v. Ladmer*, 429 F. Supp. 1231, 1243-44 (E.D.N.Y. 1977), embezzlement of funds in connection with the travel of delegates to a union convention was not found to be connected closely enough to the conduct of union affairs. *Id.* at 1237. However, *Ladmer* seems to be based on remoteness of the embezzled funds from the enterprise in question, rather than on substantially different interpretation of the term "through."



reflects the Senate's view that RICO was designed to deal with both the destruction of the affected enterprise from within and the destructive effect that an illegally run enterprise might have on other businesses.<sup>204</sup>

### C. Subsection 1962(d): Conspiracy

Subsection 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Violation of this provision also subjects the offender to a possible \$25,000 fine and twenty years imprisonment.<sup>205</sup> This subsection seems unremarkable at first glance and consequently escaped the criticisms leveled at other RICO provisions.<sup>206</sup> Yet, this subsection presents the most troublesome constitutional problems.

#### 1. A New Type of Conspiracy?

The Supreme Court has traditionally taken a rather narrow view of the scope of the conspiracy charge. In *Kotteakos v. United States*<sup>207</sup> the Court reversed the convictions of the petitioners who had been convicted of a single conspiracy to violate certain provisions of the National Housing Act concerning fraudulent loan applications. The evidence showed that "'at least eight . . . separate and independent groups, none of which had any connection with each other'"<sup>208</sup> obtained loans through one Brown based on fraudulent information. The Court conceded that the pattern was "that of separate spokes meeting in a common center," but observed that the wheel had no rim.<sup>209</sup> The Court approved the analogy of the court of appeals to a fencing operation: "Thieves who dispose of their loot to a single receiver . . . do not by that fact alone become confederates. . . ."<sup>210</sup> In thus reversing the single conspiracy conviction, the Court observed that mass conspiracy trials

are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass. . . .

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere conven-

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204. SENATE REPORT, *supra* note 30, at 76-78.

205. 18 U.S.C. § 1963(a) (1976). The conspiracy provision is different from the general conspiracy statute, *id.* § 371, which makes it a crime to conspire "to commit any offense against the United States." The significance of this difference is discussed at text accompanying notes 264-71 *infra*.

206. See 116 CONG. REC. 35212 (1970) (letter from ACLU).

207. 328 U.S. 750 (1946).

208. *Id.* at 754.

209. *Id.* at 755.

210. *Id.*

ience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials.<sup>211</sup>

While the Court in *Kotteakos* also based its decision in part on the intent of Congress, it seems clear from the above language that the decision had a constitutional basis as well—apparently the double jeopardy clause of the fifth amendment<sup>212</sup> and the sixth amendment right of accused individuals to be confronted with the charges against them.<sup>213</sup> Thus, even if Congress had made it clear that a connection with one individual was enough to render all actors guilty of a single conspiracy under the statute, it is apparent that the *Kotteakos* Court would have reversed the convictions.

*Kotteakos* was distinguished in *Blumenthal v. United States*,<sup>214</sup> in which the convictions of coconspirators involved in a single whiskey-selling scheme were upheld despite the fact that many of the conspirators did not have contact with others. The chain conspiracy was approved because all defendants were involved in a single scheme, knew they were involved in that scheme, and knew they were “aiding in a larger plan.”<sup>215</sup>

Notwithstanding the Court's early reservations concerning conspiracies expressed in *Kotteakos*, the desirability of conspiracy charges from a prosecutor's point of view<sup>216</sup> has caused the government to push at the outer limits of the doctrine in a continual effort to expand it. In *United States v. Elliott*<sup>217</sup> the Court of Appeals for the Fifth Circuit concluded that Congress, by virtue of RICO, had breathed new life into conspiracy law and created a new type of conspiracy—the “enterprise conspiracy.”<sup>218</sup> This notion, entirely unsupported by the legislative history or the words of the statute,<sup>219</sup> represents a substantial expansion of the already broad preserves of conspiracy doctrine and further exemplifies the desire of the courts to deal sternly with racketeers, even if accurate statutory construction must be sacrificed.

*Elliott* involved six defendants, who, along with thirty-seven unin-

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211. *Id.* at 773.

212. *Id.* at 763, 765.

213. The Court observed that “we do not think that either Congress . . . or this Court [in *Berger v. United States*, 295 U.S. 78 (1935)] intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes . . .” 328 U.S. at 773. In *Berger* the Court had upheld a conspiracy indictment in the face of a challenge based on these two provisions of the Bill of Rights. 295 U.S. at 82.

214. 332 U.S. 539, 547-48, 558 (1947).

215. *Id.* at 559.

216. Judge Learned Hand called conspiracy the “darling of the modern prosecutor's nursery.” *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). See generally P. MARCUS, PROSECUTION AND DEFENSE OF CONSPIRACY CASES (1978) (discussion of various procedural advantages to prosecutor in using conspiracy charge).

217. 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

218. *Id.* at 902.

219. See text accompanying notes 9-40 *supra*.

dicted coconspirators, committed a series of unrelated crimes over a six-year period. While all the defendants lived in the same area and apparently knew each other, they did not form any agreements beyond those required to commit each individual crime.<sup>220</sup> Each crime involved one or more defendants, but no crime involved all of them, nor was any one of the defendants involved in every crime charged. Most of the crimes involved two or three participants and were of great diversity, including arson, murder, thefts from interstate shipments, and narcotics offenses.<sup>221</sup> There was no pooling of resources or profits from crime to crime or any organization of the entire group. The defendants were convicted of the various substantive offenses as well as of violations of subsections 1962(c) and (d). The "enterprise" was defined as the group of individuals who associated to commit the various crimes.<sup>222</sup> Because the crimes affected interstate commerce, it followed that the activities of the enterprise affected interstate commerce.<sup>223</sup>

In dealing with the conspiracy count, the court discussed *Kotteakos* and *Blumenthal*<sup>224</sup> and concluded that, under those cases, the RICO conspiracy count could not have been upheld.<sup>225</sup> However, because of its findings that the sanctions available to the government in the fight against organized crime were "unnecessarily limited in scope and impact," the court in *Elliott* held that Congress intended to create the new "enterprise conspiracy," which would support the conspiracy conviction.<sup>226</sup>

Neither the statute itself nor the legislative history demonstrate a congressional intent to expand the scope of conspiracy law beyond that which was previously delineated by the Supreme Court, and it is an extraordinary feat of creativity on the part of the Fifth Circuit to interpret a vague remark concerning unnecessarily limited sanctions as concrete evidence of such intent.<sup>227</sup> Even if Congress had attempted to create an "enterprise conspiracy," the charge, at least as interpreted in

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220. See 571 F.2d at 898-900.

221. *Id.* at 884-94.

222. *Id.* at 898 n.18.

223. *Id.* at 897 n.16.

224. *Id.* at 900-01.

225. *Id.* at 902.

226. *Id.*

227. The court in *Elliott* observed that

Congress found that "organized crime continues to grow" in part "because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." Thus, one of the express purposes of [RICO] was "to seek the eradication of organized crime . . . by establishing new penal provisions and by providing enhanced sanctions and new remedies. . . ."

*Id.* at 902. Nowhere did Congress indicate that these "new remedies" would take the form of a new type of conspiracy. For example, the section analysis in the House Report does not discuss the conspiracy provision beyond saying: "Subsection (d) makes conspiracy to violate (a), (b) or (c) equally subject to the sanctions [provided] below." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 547, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4033. The Senate Report is similarly silent. SENATE REPORT, *supra* note 30, at 159.

*Elliott*, would have been unconstitutional as violative of the double jeopardy clause and principles enunciated in *Kotteakos*. The enterprise in *Elliott* was a series of unrelated criminal acts and was the same as the "pattern of racketeering activity." Thus, the RICO conspiracy was a conspiracy to commit a series of criminal acts by means of (the same) series of criminal acts. And how was the agreement to be shown? By the commission of the same series of criminal acts. The *Elliott* court created two new federal crimes—a subsection 1962(c) RICO violation and a subsection 1962(d) RICO conspiracy—from nothing more than a series of simple statutory violations. The element of agreement, necessary to distinguish the conspiracy charge from the substantive offense, is missing. Proof of the substantive offense automatically makes out a conspiracy, according to the court, because one of the elements of the substantive offense, the pattern, satisfies the agreement element of the conspiracy.<sup>228</sup> In addition, the problem of *Kotteakos*, that the wheel had no rim,<sup>229</sup> is present in *Elliott*.<sup>230</sup> Indeed, in *Elliott* it is even difficult to say that the wheel had a hub. It is nothing more than a series of unconnected spokes. The conspirators in *Elliott* had less to unify them in a common scheme or plan than had the defendants in *Kotteakos*. Nor is a chain conspiracy present as in *Blumenthal*. There is no simple scheme and therefore no knowledge by defendants that they were participating in such a scheme.

The absence of any such unifying element meant that the defendants in *Elliott* who, for example, stole meat from an interstate shipment, were tried for conspiring to violate RICO with those accused of arson, even though the meat theft occurred two years after the arson and was entirely unrelated. Thus, the expansion of conspiracy law declared by the *Elliott* court is in no way suggested by the language of the statute or its legislative history and contains serious constitutional flaws.<sup>231</sup>

## 2. Conspiracy to Engage in Nonwrongful Conduct

Beyond the problems raised by the *Elliott*<sup>232</sup> interpretation, subsection 1962(d) has additional flaws. The necessary definition of a RICO conspiracy—an agreement to violate a substantive RICO provision—is an unusual formulation of the conspiracy violation. In a normal conspiracy the conspirators agree to do an illegal act, such as rob a bank,<sup>233</sup>

228. This violates the double jeopardy clause under *Blockburger v. United States*, 284 U.S. 299, 305 (1932).

229. 328 U.S. at 755.

230. 333 U.S. at 97. See also *Lanzetta v. New Jersey*, 306 U.S. 451, 456-58 (1939).

231. For an extended discussion of the flaws in the *Elliott* decision, see Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109, 123-26 (1979).

232. See text accompanying notes 217-31 *supra*.

233. The illegal act need not be criminal, but may be subject to civil penalties, as in antitrust violations. See *United States v. Hutto*, 256 U.S. 524, 529 (1921). In some states, the act conspired to need not be illegal, but merely immoral, although the validity of

from which they will derive a benefit. Establishing the existence of a conspiracy, an inchoate offense, depends on a showing of an agreement to perform a complete offense<sup>234</sup>—bank robbery—before the conspiracy offense can be established.

A RICO conspiracy is different because the predicate offenses, subsections 1962(a), (b), and (c), are themselves incomplete<sup>235</sup>—they do not define any wrongful behavior unless the two pattern offenses are independently proved. Rather, these subsections forbid the otherwise legitimate behavior of purchasing and operating enterprises engaged in interstate commerce. Thus, the conspiracy is now two steps removed<sup>236</sup> from the only inherently wrongful activity discussed in the statute.<sup>237</sup>

The question of whether inchoate crimes can be infinitely pyramided, each adding an additional punishment for the unsuspecting offender, has never been directly confronted by the Supreme Court.<sup>238</sup> An analysis of the question depends on an understanding of the pur-

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such provisions is questionable. See P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.06 (1)-(2) (1978).

234. W. LAFAVE & A. SCOTT, CRIMINAL LAW 460 (1972).

235. The offense is not inchoate in the usual sense of the term, that is, that the conduct made criminal is "designed to culminate in the commission of a substantive offense" but has failed to do so. Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. I), 61 COLUM. L. REV. 571, 571 (1961). The conduct prohibited by RICO is defined only by reference to another offense, but is not "designed to culminate in the commission" of that offense. Thus, the term "incomplete" is used instead of the term of art "inchoate."

236. That is, an agreement to acquire an enterprise engaged in interstate commerce through a pattern of lawful activity is obviously not evil. It is only when it is acquired through a pattern of other crimes that the statute has any effect, and the other crimes must be independently shown. Thus, § 1962(a) is a step removed from inherently wrongful behavior and a RICO conspiracy is two steps removed from this type of behavior.

237. Some of the predicate offenses listed in § 1961(1) are themselves conspiracies, see 18 U.S.C. § 892(a) (1976), or otherwise inchoate offenses, see *id.* § 1952. Thus, a RICO conspiracy may be even a further step removed from actual substantive wrongdoing. Furthermore, there is no statutory prohibition against charging a conspiracy to violate, say § 1952, while using the same § 1952 violations as predicates for a RICO charge and a RICO conspiracy charge.

238. The courts of appeals have had no difficulty approving multiple convictions for a substantive RICO count as well as for a conspiracy to commit the substantive offense. See, e.g., *United States v. Frumento*, 563 F.2d 1083, 1089 (3d Cir. 1977); *United States v. Clemones*, 557 F.2d 1247, 1254 (5th Cir. 1978), *modified on other grounds*, 582 F.2d 1373 (5th Cir. 1978); *United States v. Altese*, 542 F.2d 104, 106-07 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

There is support for the notion that a conspiracy charge cannot be too far removed from the evil sought to be protected against, at least when a free speech interest is involved. *Yates v. United States*, 354 U.S. 298, 305-06 (1957). See also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). But these cases clearly rely on protection of free speech and not on an analysis of conspiracy law in general.

The courts of appeals have approved similar pyramiding of incomplete offenses in other types of cases. Thus, convictions for each of numerous interstate trips to further a single unlawful activity (18 U.S.C. § 1952 (1976)) as well as conspiracy to violate § 1952 have been approved. *United States v. Polizzi*, 500 F.2d 856, 896-99 (9th Cir. 1974) (Browning, J., concurring), *cert. denied*, 419 U.S. 1120 (1975). See also *United States v. Cerone*, 452 F.2d 274, 290-91 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

poses underlying conspiracy law.<sup>239</sup> It has been long established that it is permissible to inflict dual punishment for a substantive offense and for a conspiracy to commit that offense; they are separate crimes.<sup>240</sup> The reason for this was explained in some detail in *Callanan v. United States*:<sup>241</sup>

[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.<sup>242</sup>

The sociological assertions contained in the above and similar passages have been questioned,<sup>243</sup> and the imposition of multiple sentences for conspiracy and the completed offense has been criticized.<sup>244</sup> Indeed, the

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239. To the extent that conspiracy law serves the function of imposing criminal sanctions on preparatory activity, see *United States v. Feola*, 420 U.S. 671, 693-94 (1975) (conspiracy charge added to charge for completed crime), its function and value is obvious.

240. See, e.g., *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *Gore v. United States*, 357 U.S. 386, 391 (1958).

241. 364 U.S. 587 (1961).

242. *Id.* at 593-94 (footnote omitted).

243. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959):

Though these assumed dangers from conspiracy have a romantically individualistic ring, they have never been verified empirically. It is hardly likely that a search for such verification would end in support of Holdsworth's suggestion that combination alone is *inherently* dangerous. This view is immediately refuted by reference to our own society, which is grounded in organization and agreement. More likely, empirical investigation would disclose that there is as much reason to believe that a large number of participants will increase the prospect that the plan will be leaked as that it will be kept secret; or that the persons involved will share their uncertainties and dissuade each other as that each will stiffen the others' determination. Most probably, however, the factors ordinarily mentioned as warranting the crime of conspiracy would be found to add to the danger to be expected from a group in certain situations and not in others; the goals of the group and the personalities of its members would make any generalization unsafe and hence require some other explanation for treating conspiracy as a separate crime in all cases.

*Id.* at 414 (emphasis original) (footnote omitted).

244. See Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 197-98 (1972); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959).

authors of the Model Penal Code concluded that such multiple punishments were unjustified in the case of a conspiracy to commit a completed crime:

When a conspiracy is declared criminal because its object is a crime, we think it is entirely meaningless to say that the preliminary combination is more dangerous than the forbidden consummation; the measure of its danger is the risk of such a culmination. On the other hand, the combination may and often does have criminal objectives that transcend any particular offenses that have been committed in pursuance of its goals. In the latter case, we think that cumulative sentences for conspiracy and substantive offenses ought to be permissible . . . . In the former case, when the preliminary agreement does not go beyond the consummation, double conviction and sentence are barred.<sup>245</sup>

To the extent that the criminal law is designed to deter crime, it presupposes that the potential criminal engages in a rough calculation, weighing the potential benefits against the chance of getting caught times the likely punishment. The system is supposedly constructed so that the negative balance outweighs the positive and thus discourages crime. If the chance of getting caught is diminished by the participation of either an inside contact at the bank or a getaway driver, it is justifiable for society to increase the likely penalty for bank robbery to ensure that the balance will not shift in favor of commission of the crime. Thus, contrary to the assertion of the Model Penal Code authors, imposition of an additional penalty for concerted activity has a deterrence justification independent of the penalty for the completed crime.

However, in the case of the getaway driver, for example, the evil arises not from the conspiratorial agreement, but from the driver's actual participation in the crime. If a getaway driver agrees to help a bank robber but fails to show up, society has not suffered.<sup>246</sup> Indeed, the robber, left without the planned means of escape, is probably less likely to rob the bank than if he had planned the crime alone in the first place. Yet, under current conspiracy law, the robber who nevertheless proceeds alone with the robbery is subject to an additional five-year penalty<sup>247</sup> for having agreed with the fainthearted driver to commit the bank robbery.

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245. Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. II), 61 COLUM. L. REV. 957, 960 (1961) (citing MODEL PENAL CODE § 1.08(1)(b) (Tent. Draft No. 5 (1956))).

246. It is, of course, possible to materially facilitate a crime through advice or encouragement, not merely through participation. But the getaway driver who fails to arrive can in no sense be thought to have facilitated the crime.

247. The fainthearted driver is also subject to an additional penalty. Under current conspiracy law the failure of the driver to appear at the bank would not, without more, constitute withdrawal from the conspiracy and, even if the driver was found to have

Clearly, in the case of a completed crime, the only time coconspirators wrong society is when they materially facilitate<sup>248</sup> the commission of the crime in some way; or, to put it another way, when the coconspirators aid, abet, counsel, command, induce, or procure the commission of the crime. This familiar language is from 18 U.S.C. § 2, which forbids not conspiracies, but aiding and abetting and provides that the aider and abettor is punishable as a principal. Curiously, despite the fact that the evil posited in *Callanan*<sup>249</sup> has actually occurred in the aiding and abetting situation, *no* additional punishment is prescribed for the principal actor.

Thus, conspiracy law, as it is currently construed, punishes conspiracies because of the purely mystical belief that to conspire is evil, despite the fact that the evils enumerated may not have occurred in the case under consideration. The more sensible approach is not to abolish conspiracy charges for completed crimes,<sup>250</sup> but to provide that a principal who has been aided and abetted in the commission of a crime is subject to additional punishment.<sup>251</sup>

withdrawn, the principal could still be found guilty of the conspiracy. See *Hyde v. United States*, 225 U.S. 347, 369-70 (1912); P. MARCUS, PROSECUTION & DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.07 (1978). A common occurrence in conspiracy cases is that one of the conspirators is arrested before the object of the conspiracy can be attained. This, standing alone, does not entitle a defendant to a directed verdict on the issue of withdrawal. *United States v. Panebianco*, 543 F.2d 447, 453-54 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977); *United States v. Harris*, 542 F.2d 1283, 1301 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977).

248. It is obvious that despite the well-settled principle that an aider and abettor is not the same as a coconspirator, *e.g.*, *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *United States v. Polizzi*, 500 F.2d 856, 897 n.3 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), the distinction has no foundation, other than in statutory language, in the case of a completed crime. Technically, no proof of agreement is necessary to show aiding and abetting, but the acts required to show a violation for aiding and abetting will always be enough for the jury to infer an agreement or concerted action to commit the crime. Thus, it is impossible to aid and abet a completed crime without also being guilty of conspiracy. Separate punishment for aiding and abetting and conspiracy, therefore, should be considered a double jeopardy violation. The only conspirator who does not aid, abet, counsel, command, induce, or procure, 18 U.S.C. § 2 (1976), the crime is the "fainthearted driver"—a conspirator who agrees to assist in the crime but, for some reason, does not. As discussed in the text, the fainthearted driver should not be considered a conspirator.

249. See text accompanying note 241 *supra*.

250. The Model Penal Code abolishes conspiracy charges for completed crimes. See Wechsler, Jones & Korn, *The Treatment of the Inchoate Crimes in the Model Penal Code of the American Law Institute—Attempt, Solicitation, and Conspiracy* (pt. II), 61 COLUM. L. REV. 957, 960 (1961). The merger of the conspiracy into the completed offense was the traditional rule, but the rule existed for different reasons that are here put forth. See *Callanan v. United States*, 364 U.S. 587, 589-90 (1961).

251. Under this formulation, aiders and abettors would not be subjected to double punishment for the identical acts of conspiring to commit a completed crime and aiding that crime. Similarly, principals would not be punished for conspiring with someone who did not facilitate the crime. However, as opposed to "contemplated concerted criminal activity," "concerted criminal activity," which obviously does subject society to greater risks in most cases and is the evil the conspiracy laws actually seek to prevent, *United States v. Feola*, 420 U.S. 671, 693-94 (1975), will be subject to additional punishment.



Given that conspiracy or agreement to commit a completed crime is not an evil in itself, it follows that conspiracy to commit an *incomplete* crime, such as is provided for in RICO, is also not an evil in itself. The evil lies in the completed crime. Conspiracy is legitimately punishable not because it is evil, but because it may reasonably be expected to *lead* to evil or to facilitate the doing of evil deeds. Accordingly, when the deeds are not themselves evil, the conspiracy should not be a crime unless the conspiracy includes the independent harm of people *knowingly* agreeing to violate the law—a harm legitimately punishable in its own right.

Do subsections 1962(a), (b), and/or (c) proscribe inherently wrongful conduct? Certainly subsection 1962(a) does not; all it forbids is the investment of ill-gotten gains. To whatever degree society may have been disadvantaged by the original racketeering activity, it is not harmed further by investment of the proceeds. Congress apparently believed that society was disadvantaged because the racketeers would misuse the legitimate businesses in which they invested.<sup>252</sup> This analysis is undoubtedly accurate, but irrelevant to the question. To the extent that racketeers, after they have acquired a new business, may engage in extortion or other crimes to advance their business interests, they violate other laws. Similarly, if the racketeers engage in securities or bankruptcy fraud, their conduct may be, and frequently is, otherwise prohibited. But subsection 1962(a) forbids any investment of “dirty money” in enterprises engaged in interstate commerce because of the speculation that some investments may be misused. Obviously, the potential for misuse depends not on whether the funds invested were derived from a pattern of racketeering activity, but on whether the individual involved is a racketeer, even if the funds came from a purely legal source. Thus, subsection 1962(a) does not forbid any inherently wrongful conduct, but merely conduct that Congress feared might later lead to harm.<sup>253</sup>

When a conspiracy to violate such a statutory provision is considered, the statutory scheme becomes particularly difficult to justify. The Supreme Court in *United States v. Feola*<sup>254</sup> held that one could be convicted of conspiracy to assault a federal officer without being aware that the assaulted individual was in fact a federal officer. However, the Court's decision was specifically based on the recognition that the substantive offense of assault was an inherently wrongful act, and that the defendant who knowingly committed that act possessed sufficient *mens rea* to violate the conspiracy statute as well.<sup>255</sup> The Court left open the question, posed by a conspiracy to violate subsection 1962(a), of

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252. See SENATE REPORT, *supra* note 30, at 76.

253. See text accompanying notes 172-90 *supra* (discussion of § 1962(a)).

254. 420 U.S. 671 (1974).

255. *Id.* at 692. The Court rejected the reasoning of *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941), that one must be aware of the federal jurisdictional aspects of the crime to be convicted of conspiracy to commit the crime (but not necessarily to be convicted of the substantive offense).

what the necessary *mens rea* may be when the substantive offense is not itself wrongful.<sup>256</sup> The traditionally accepted answer, first proposed in *People v. Powell*,<sup>257</sup> is that the conspirators must have knowledge that the contemplated acts violate the law.<sup>258</sup> This answer makes sense when applied to a subsection 1962(a) conspiracy, because the only possible harm to society in a conspiracy to perform harmless acts stems from the fact that such conduct is nevertheless illegal (here, because Congress feared a potential later harm). Society can rightly punish its members for agreeing to commit criminal violations, even though the actors may feel that the proscribed conduct should not be a crime. However, if they violate subsection 1962(a) inadvertently, with no actual or constructive knowledge of its existence, it may be fair to convict them of the substantive violation, but analytically impossible to justify an additional conviction for *agreeing* to violate the statute. Unlike the situation in *Feola*, the defendants are not on notice that their conduct is wrongful.<sup>259</sup>

The above argument applies to conspiracy to violate subsection 1962(a) charged under the general conspiracy statute (18 U.S.C. § 371). A conspiracy charged under the RICO conspiracy provision—subsection 1962(d)—may be even more easily disposed of. Subsection 1962(d) provides that “it shall be unlawful for any person to conspire to violate the provisions of subsections (a), (b) or (c) of this section,” in contrast to the broader provisions of the general conspiracy statute that forbids conspiracy “to commit any offense against the United States.”<sup>260</sup> While one could be guilty of conspiring to commit the federal offense of bank robbery without being aware that it was a federal offense,<sup>261</sup> it does not seem that one could “conspire to violate the provisions of § 2113” (the federal bank robbery statute) without such knowledge. Thus, the wording of subsection 1962(d) suggests that, in a RICO conspiracy, knowledge of illegality is required—as distinguished from the provisions of the general conspiracy statute in which only an agreement to perform certain physical acts is necessary.

Under the foregoing analysis of a conspiracy to violate subsection (a), the “conspiracy to violate RICO” provision of subsection 1962(d) must be read literally to require a showing that the defendants

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256. 420 U.S. at 692.

257. 63 N.Y. 88, 92 (1875); see *United States v. Feola*, 420 U.S. 671, 691 (1974).

258. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 937-40 (1959) and cases cited therein. See also *Direct Sales Co. v. United States*, 319 U.S. 703, 710-15 (1943). In *Direct Sales* the Court distinguished between engaging in free commerce, which is essentially what § 1962(a) forbids racketeers from doing, and engaging in conduct which, though technically legal, was sufficiently suspicious to put the actor on notice that he or she was involved in a criminal conspiracy. Only in the latter case was the requisite intent established. *Id.* at 713.

259. Indeed, one would be unlikely to suppose, as a moral matter, that it was wrong to buy an interstate business, regardless of one's previous occupation or the source of one's funds.

260. 18 U.S.C. § 371 (1976).

261. *United States v. Feola*, 420 U.S. at 684.

specifically agreed to violate subsection 1962(a). Such an intent will be virtually impossible for the prosecution to show,<sup>262</sup> and, therefore, it follows that convictions of subsection 1962(a) conspiracies should be largely precluded.<sup>263</sup>

### 3. Conspiracy to Violate Subsections 1962(b) and (c)

The analysis of subsections 1962(b) and (c), however, is different.<sup>264</sup> While it is not an inherently wrongful act to invest ill-gotten gains, it would appear to be wrongful to use racketeering activities to infiltrate and take over a legitimate business<sup>265</sup> or to use racketeering acts in the operation of a business.<sup>266</sup> Society has an interest not only in preventing extortion, but also in preventing extortionate activities from destroying businesses engaged in interstate commerce or in having such businesses obtain a competitive advantage through the use of extortionate practices.

The situation presented by subsections 1962(b) and (c) is thus similar to *Feola*. The defendants agree both to engage in morally wrongful conduct—extortion, which is unlike the commercial behavior in which

262. However, there may be cases in which one conspirator will testify as to an intent to circumvent the RICO restrictions; the requisite intent would then be present.

263. There is no direct Supreme Court authority for the premise here advanced—that conspiracy to violate a statute that does not prohibit inherently wrongful conduct cannot be shown without proof that the actor knowingly agreed to violate the substantive statute. However, the following passage from *Direct Sales Co. v. United States*, 319 U.S. 703 (1943) is instructive:

Without the knowledge, the intent cannot exist . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.

*Id.* at 711 (citation and footnote omitted), *quoted in* *Ingram v. United States*, 360 U.S. 672, 680 (1959).

*Direct Sales* involved a defendant mail order drug company that sold large quantities of morphine sulphate to a physician. The Court held that the fact of the sales alone was enough to establish the intent necessary to sustain a conspiracy conviction to sell narcotics because the defendant must have been aware of the physician's intent to illegally sell the drugs. The Court distinguished *United States v. Falcone*, 311 U.S. 205 (1940), in which a defendant who has supplied "sugar, cans, and other articles of normal trade" to a moonshiner was found not guilty of conspiracy. 319 U.S. at 711. The *Falcone* conspiracy was defective because the seller, *Falcone*, was charged not simply with conspiracy with the buyer but, through the sales, of *joining* a conspiracy between the buyer and others. The Court held that the requisite knowledge of such a conspiracy could not be inferred from the mere sale of articles of normal trade. 311 U.S. at 210-11. A RICO conspiracy, charging as it must that defendants conspired essentially to engage in "normal trade," would seem subject to the limitations on conspiracies expressed in *Falcone* and *Direct Sales*.

264. This is so except insofar as the working of § 1962(d) itself indicates a higher standard of *mens rea*. See text accompanying notes 254-63 *supra*.

265. See *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (defendant embezzled money from one Goberman and used money to buy out Goberman's interest in Caribbean gambling casino).

266. See *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (defendants enhanced their truck unloading business by threatening shippers with labor problems if they did not use defendants' company for shipments).

they engaged under subsection (a), and to take over or operate a business through a pattern of extortionate activities. They are thus “conspiring to commit an offense against the United States,” according to the reasoning of *Feola* and the wording of 18 U.S.C. § 371 (the general conspiracy statute), and they could be convicted of violating subsection 1962(c) and section 371. However, it cannot be said that they are conspiring “to violate § 1962(c)” as subsection 1962(d) requires, unless it can be shown that they did just that—agreed to violate subsection 1962(c), which they could not do without an awareness of the provisions of subsection 1962(c) and an intent to violate those provisions.<sup>267</sup>

Based on the wording of the RICO conspiracy statute as well as the principles of conspiracy law, it would appear that actual knowledge of the pertinent substantive RICO provision is necessary for any violation of subsection 1962(d). Furthermore, since subsection 1962(a) forbids conduct not inherently wrongful, such knowledge would also be required to show a conspiracy to violate this provision under the general conspiracy statute, section 371. However, since subsections 1962(b) and (c) do involve inherently wrongful activity, it would be possible to conspire to violate these provisions under the general conspiracy statute without proof of specific knowledge of the prohibitions.<sup>268</sup>

This view of the conspiracy provisions of RICO solves an additional problem—that of the nonracketeer participant. With regard, for instance, to subsection 1962(a), which forbids a racketeer’s acquisition of an enterprise engaged in interstate commerce, with whom is the racketeer likely to conspire? To be sure, other racketeers may be involved, but if the business has heretofore been legitimate, presumably the person from whom the racketeer buys will be a legitimate entrepreneur. Under normal concepts of *mens rea* as applied to conspiracy law, the businessman who accepts a reasonable offer to purchase his business would be guilty of conspiracy if he was aware of the operative facts—that the purchaser was indictable for two prior pattern crimes, that the money had come directly or indirectly from such crimes, and that the enterprise was engaged in or affected interstate commerce.<sup>269</sup> Knowledge that he was forbidden by law to sell to such a person would be

267. Since § 1963(a) provides for 20 years imprisonment for violations of § 1962, as opposed to five years under § 371, it is sensible that Congress required a greater degree of scienter for violation of the former provision. While Congress may have felt that the substantive RICO provisions required harsher penalties, a conspiracy to violate RICO is no more harmful to society than a conspiracy to commit extortion, because, as the Supreme Court made clear in *Callanan v. United States*, 364 U.S. 587, 593-94 (1961), the harm of conspiracy is unrelated to the harm of the substantive offense. Accordingly, there is no justification for punishing a RICO conspiracy more harshly unless it involves a higher level of scienter.

268. Cf. *Morissette v. United States*, 342 U.S. 246, 270-71 (1952) (defendant “must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion”).

269. The rule in *Feola* is that “a conspiracy to commit [an] offense is nothing more than an agreement to engage in the prohibited conduct.” 420 U.S. at 687.

unnecessary. But Congress clearly never intended to include dry cleaners and truckers who receive favorable offers for their businesses within the coverage of subsection 1962(d), even if they know that the purchaser is a racketeer. It is thus consistent with the obvious congressional intent that such a businessman, before he can be convicted under subsection (d), must *know* that he is agreeing to violate subsection 1962(a), (b), or (c)<sup>270</sup> when he contracts, pursuant to a reasonable offer, to sell his business to a racketeer.<sup>271</sup>

#### IV. SUBSECTION 1963:<sup>272</sup> CRIMINAL PENALTIES

##### A. *What Interests are Forfeitable?*

Subsection 1963(a) provides for up to twenty years imprisonment and a \$25,000 fine for violation of any provision of section 1962, plus the forfeiture to the United States of

270. If the businessman knows the racketeer plans to use the business for illegal purposes, under the reasoning of *Feola* he would perhaps be guilty of the § 371 conspiracy to violate RICO, even if he was unaware of the RICO prohibitions. *See* text accompanying notes 254-55 *supra*.

271. Of course, the businessman could not be convicted under subsections (a), (b), or (c) himself because those provisions apply only to racketeers. But it is not necessary to be a racketeer to violate subsection (d). *See* 18 U.S.C. § 1962(d) (1976).

272. The text of 18 U.S.C. § 1963 (1976) reads:

##### § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(1) any interest [the defendant] has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.

Forfeiture of an individual's property as a consequence of a criminal conviction in an in personam proceeding was not an available punishment prior to the enactment of this subsection.<sup>273</sup> However, Congress asserted that this new approach would "remove the leaders of organized crime from the sources of their economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence."<sup>274</sup>

There are certain practical problems in applying this subsection, notably the question of exactly what interests are forfeitable. In *United States v. Rubin*<sup>275</sup> the Court of Appeals for the Fifth Circuit considered the case of an individual who had operated certain union offices through a pattern of racketeering activity in violation of subsection 1962(c). The question was whether a union office was within any of the interests section 1963 provided would be forfeitable. The court found that since the union official held his office pursuant to a contract, he had a contractual right under section 1963 that was subject to forfeiture.<sup>276</sup>

As previously discussed,<sup>277</sup> it is impossible to apply RICO to a state official if the enterprise in question is an arm of the state government.

273. See *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977):

Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law of England and the colonies, is foreign to the federal criminal law. The 91st Congress recognized that, in passing § 1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeiture of estate."

*Id.* at 991 n.15.

274. SENATE REPORT, *supra* note 30, at 80.

275. 559 F.2d 975 (5th Cir. 1977).

276. Section 1963(a) provides for forfeiture to the United States, which is obviously not possible in the case of a union office. However, as the court observed, § 1963(c) provides for this contingency by stating that a forfeited interest "not exercisable by the United States shall terminate." 559 F.2d at 992 n.18. The *Rubin* court also observed that the forfeiture provisions

can have no proper effect on appellant's right in the future to seek union office . . . . That right . . . is not something appellant as an individual has acquired or maintained [in connection with the RICO violation] . . . ; it is the same right possessed by all members of all unions . . . . The language of the new penal statute does not extend to such a right.

*Id.* at 992-93. But see 29 U.S.C. § 504(a)(1) (1976) (providing for barring of union officials from future office holding). Furthermore, § 1964(a) provides for "prohibiting [the defendant] from engaging in the same type of endeavor as the enterprise engaged in . . . ."

277. See text accompanying notes 115-32 *supra*.

Even if the office could be found to be an interest or contractual right within the terms of 1963, it would violate the most basic principles of federalism for Congress to declare that a duly elected or appointed state official must be removed from office under a provision of *federal law*.<sup>278</sup> Clearly, Congress had no intention of so providing.

### B. Procedures for Forfeiture

In *United States v. Mandel*<sup>279</sup> the court considered the government's application for a temporary restraining order pursuant to subsection 1963(b)<sup>280</sup> to prevent defendants from divesting themselves of their assets during the pendency of their RICO trial.<sup>281</sup> The court observed that a prerequisite for a temporary injunction is "a showing that the petitioner will be likely to prevail on the merits at trial."<sup>282</sup> The court concluded that such a pretrial finding in a criminal case would be inconsistent with the presumption of innocence.<sup>283</sup> Furthermore, the hearing on the issue would present the defendants with the dilemma of choosing between defending themselves against the allegations at the preliminary proceeding, and thus having their statements used against them at the trial itself, or of essentially conceding the government's allegations of participation in activities that would later be the essence of the criminal trial. Accordingly, the court denied the government's petition.<sup>284</sup>

Defendants could largely thwart the purposes of RICO by divesting themselves of the asset in question after indictment and later buying it back with the retained funds.<sup>285</sup> It thus seems that the court has put too fine a point on the prerequisites for a preliminary restraining order. In view of the explicit provision for such orders in subsection 1963(b), the court would be justified in issuing the order on the strength of the

278. See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 677 (1978); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-08 (1861).

279. 408 F. Supp. 679 (D. Md. 1976).

280. Section 1963(b) provides that the courts may "enter such orders or prohibitions . . . in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper."

281. Pursuant to F. R. CRIM. P. 7(c)(2), the indictment alleged "the extent of the interest or property subject to forfeiture." See 408 F. Supp. at 681.

282. 408 F. Supp. at 682 (citing 7 MOORE'S FEDERAL PRACTICE ¶ 65.04[1] (1979)).

283. *Id.* at 683. *Contra*, *United States v. Scalzitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975).

284. 408 F. Supp. at 684. Actually, since *Simmons v. United States*, 390 U.S. 377 (1968), this dilemma probably no longer exists. *Simmons* forbade the government to use testimony in a pretrial suppression hearing against the defendant at trial. *Id.* at 394. While *Simmons* vindicated fourth amendment rights not involved here, the "fair play" principles of the case seem equally applicable, and the government would likely feel that *Simmons* effectively precluded any later use of pretrial hearing testimony.

285. RICO does not require forfeiture of money earned from racketeering, but only the defendant's interest in the affected enterprise. 18 U.S.C. § 1963(a) (1976). It is incumbent on the government to make sure that the asset does not change its form during the pendency of the litigation. See 18 U.S.C. § 1963(b) (1976).

indictment<sup>286</sup> plus some showing by the government of a danger of divestiture, notwithstanding the more stringent requirements for such an order in normal civil practice. If the government were not required to make a preliminary showing of the defendant's likely guilt, the court would be absolved from having any finding inconsistent with the presumption of innocence, and the problems posed in *Mandel* would be eliminated.

Some additional situations involving subsection 1963 must be considered: Suppose a defendant made \$100,000 through a pattern of extortion activities in violation of 18 U.S.C. § 1951. The defendant invested \$50,000 in a trucking business and put \$50,000 in the bank. Because, as was argued previously,<sup>287</sup> the series of extortionate activities cannot constitute the enterprise, the enterprise in question is the trucking business and only the \$50,000 invested in that business is forfeited.

Now suppose that ten years have passed since the investment in the trucking business, which has operated legitimately over that period of time. Defendant's interest is now worth \$300,000. How much is to be forfeited? Apparently the entire \$300,000 since "any interest" and not "any funds invested" is what subsection 1963(a) provides should be the subject of the forfeiture. On the other hand, the income or profits that defendant has derived from the enterprise (as opposed to the value of the defendant's "interest") would not, under the terms of the statute, be subject to forfeiture.<sup>288</sup>

More difficult questions arise in considering corporate misconduct. Suppose that corporate officials of one branch of a major national conglomerate bribed two local officials in connection with the acquisition of a plant in Chicago. According to the definitions in subsection 1961(3), it is possible for a corporation to violate RICO.<sup>289</sup> Thus, two RICO violations have been made out against the conglomerate. First, the conglomerate acquired the Chicago plant through a pattern of racketeering

286. The use of an indictment constitutes a finding of probable cause by the grand jury. 8 MOORE'S FEDERAL PRACTICE ¶ 6.02[2][c] (1979).

287. See text accompanying notes 78-114 *supra*.

288. A federal district court recently so held in a case in which the government urged that all profits derived from an illegally operated pornography business should be forfeited. *United States v. Thevis*, 474 F. Supp. 134, 142-44 (N.D. Ga. 1979). Similarly, in *United States v. Marubeni America Corp.*, CR No. 78-1060 (C.D. Cal. May 30, 1979), the court held that "interest" did not include income to a corporation from the sale of certain telephone cables, which income was allegedly acquired through a pattern of racketeering activity. This approach is sensible. The statute is not designed to punish racketeering, but to prevent racketeering from infiltrating other businesses. It follows that the statute should not be interpreted, in defiance of its clear language, to deprive racketeers of their income, but only of the interest they have acquired in other enterprises (or of their interest in an enterprise conducted by means of racketeering). In certain cases, it may be difficult to separate interest and income, but that does not appear to have been a problem in these two cases.

289. A corporation is an "entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1976).



activity in violation of subsection 1962(b). Second, the affairs of the conglomerate branch were conducted through a pattern of racketeering activity in violation of subsection 1962(c).

Under the forfeiture provisions of subsection 1963(a)(1), the conglomerate would be required to forfeit "any interest . . . acquired . . . in violation of § 1962"—the new plant. Furthermore, under subsection 1963(a)(2), the conglomerate would be required to forfeit "any interest in . . . any enterprise which [it] has . . . conducted . . . in violation of § 1962"—*the entire corporate branch!*<sup>290</sup> If the conglomerate were AT&T and the branch were Western Electric, one suspects that Congress might be encouraged to rethink RICO.<sup>291</sup>

## V. CONCLUSION

It has been demonstrated that, although RICO was designed to deal with infiltration of legitimate business by organized crime, the statute, as written, has a much broader application. Any business or individual committing two pattern offenses may be guilty of "racketeering activity" under RICO. The courts, reacting to a national fear of organized crime, have further expanded the statute to read out some of the key elements, making it possible in many circuits for the government to show a violation of RICO by virtually anyone who engages in "racketeering activity," not merely those who use such activity to branch out in to other areas. The statute also has been read as greatly expanding the scope of conspiracy prosecutions, despite the fact that no congressional intent to do so can be discerned either in the statutory language or in the legislative history. Finally, the forfeiture provisions appear to allow for massive forfeitures of otherwise legitimate corporations whose executives have engaged in criminal activity on behalf of the corporation.

The constitutional and practical problems raised by these interpretations of the statute are legion. Yet RICO advances a legitimate national goal—keeping racketeers and racketeering out of the nation's commerce. If the government and the courts would restrict themselves to advancing this goal instead of using the statute to prosecute corrupt politicians, errant corporate officials, and racketeers who have no designs on commerce at all, most of the problems discussed herein would be minimized. If the courts, baffled by the often confusing language of the statute (but not wanting to be seen as interfering with the

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290. The only possible argument by which the conglomerate might avoid forfeiture would be to argue that the branch was not operated "through a pattern of racketeering activit[ies]," *id.* § 1962(c), because the activities were insignificant and incidental to the operation of the branch.

291. RICO contains four additional sections (§§ 1964-1968), which deal with civil actions, both by the government and by private citizens, in connection with RICO violations. To the limited extent that these provisions have been litigated in the courts, the issues involved have concerned the definitions in § 1961 that have been discussed previously. In view of this fact and the author's lack of expertise in civil matters, a discussion of these sections has been omitted from this Article.

patriotic war on racketeering) allow the government to expand the statute beyond the reach intended by Congress, the end result may be that the Supreme Court will strike down major portions of RICO as unconstitutional, thus thwarting the operation of the statute entirely.

## APPENDIX

## § 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473, relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of

this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

## **§ 1962. Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in

the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

### **§ 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation or forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to

informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions thereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

